

**STATE OF MISSOURI  
THREE MEMBER DUE PROCESS HEARING PANEL**

**DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION**

	, Student	)
by	, Parent,	)
		)
	Petitioner,	)
		)
vs.		)
		)
POPLAR BLUFF R-1 SCHOOL DISTRICT,		)
		)
	Respondent.	)

**COVER SHEET OF PERSONALLY IDENTIFIABLE INFORMATION**

Student's Name:

Date of Birth:

Parents' Names:

Address:

Representative: Neal E. Takiff, Esq. and Jennifer Hanson

Address: Whitted & Cleary, LLC  
3000 Dundee Road, Suite 303  
Northbrook, IL 60062

Local Representative: John H. Shock

Address: 922 W. Pine Street  
Poplar Bluff, MO 63901

Local Education Agency: Poplar Bluff R-1 School District

Address: 1110 N. Westwood Blvd.  
Poplar Bluff, MO 63901-3336

Representative: Teri B. Goldman

Address:	Teri B. Goldman, LLC 36 Four Seasons Center, #337 Chesterfield, Missouri 63017
Hearing Panel:	Janet Davis Baker, Chairperson Dr. Gale Rice Dr. Patty Smith
Date of Due Process Request:	November 23, 2004
Hearing Dates:	January 23-27, 2006 March 27-29, 2006
Date of Decision:	September 18, 2006

**STATE OF MISSOURI  
DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION  
THREE MEMBER DUE PROCESS PANEL**

<b>, Student, by and through her parent</b>	)
<b>and legal guardian,</b>	)
	)
<b>Petitioner,</b>	)
	)
<b>v.</b>	)
	)
<b>POPLAR BLUFF R-1 SCHOOL DISTRICT,</b>	)
	)
<b>Respondent.</b>	)

**FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND DECISION**

**STATEMENT OF ISSUES AND PROCEDURAL HISTORY**

This matter comes before the three-member hearing panel convened by the Missouri Department of Elementary and Secondary Education ("MDESE") pursuant to § 162.961 R.S.Mo., on the request for due process filed by the father of Student (hereinafter "Father" or "Petitioner") on behalf of his daughter (hereinafter "Student"), a student who prior to the 2004-05 school year, was enrolled in the Poplar Bluff R-1 School District (hereinafter "School District" or "District" or "Respondent"). The request was received by MDESE on November 23, 2004. A three member hearing panel was convened by MDESE consisting of panel members Dr. Gale Rice and Betty Chong (who subsequently resigned from the panel and was replaced by Dr. Patty Smith), and chairperson Janet Davis Baker. The Student and her parents are represented by Neal E. Takiff and Jennifer L. Hansen with the law firm of Whitted & Cleary, with John H. Shock as local counsel. The Respondent School District is represented by Teri B. Goldman with Teri B. Goldman, LLC.

The issues set out by Petitioner in his due process request, at Respondent's exhibit no. R-54 at 560 (hereinafter identified as "R" for Respondent's exhibits followed by exhibit and page number and "P" for Petitioners' exhibits) asserted that the School District provided an "inappropriate evaluation of a deaf child" and an "improper/substandard educational plan." Reference was made to an attached letter to Dr. Amy Jackson (the Director of Special Services for the School District) for more detail. The resolution requested was a change of location of services to the Moog Center for Deaf Education in St. Louis, Missouri.

On December 30, 2005, counsel for Student provided a statement of issues to be determined by the panel and requested relief as follows (R-58 at 714):

1. Whether the District made numerous procedural errors and acted in bad faith when describing proposed educational placement to the parents, which amount to a violation of Student's free and appropriate public education (FAPE);
2. Whether the IEP and educational placement proposed for Student for the 2004-05 school year is reasonably calculated to provide her with a free and appropriate public education (FAPE);
3. Whether the IEP and educational placement proposed for Student for the 2005-06 school year is reasonably calculated to provide her with FAPE;
4. Whether Student's placement at the Moog Oral Center for Deafness is reasonably calculated to provide her with FAPE and meet her complex special education needs.<sup>1</sup>

The relief requested was retroactive reimbursement of all costs related to Student's placement at the Moog Oral Center for Deafness (hereinafter "Moog") since Student's enrollment and an award of prospective placement and full funding of all costs for Student at Moog. Counsel for Student requested that Moog be considered Student's "current educational placement" pursuant to state and federal law. Finally, reimbursement of parents' attorneys' fees and costs was requested.<sup>2</sup>

The hearing was scheduled to begin on January 23, 2006. Less than 30 days prior to the start of the hearing, Respondent submitted a Motion to Dismiss that the chair treated as a motion for summary judgment as affidavits were included with the Motion. *See* Missouri Supreme Court Rules 55.27 and 74.04. As there would not be adequate time for a response by Petitioner prior to the scheduled hearing to a motion for summary judgment and neither party desired to continue the hearing for this purpose, the chair took the matter under advisement. The chair continued to take the matter under advisement at the postponement of the hearing on January 27, 2006, as additional evidence was to be presented by Petitioner at the continuation of the hearing in lieu of affidavits. As the hearing is now concluded, the chair determines the motion moot in light of the taking of evidence at hearing and by this ruling.

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<sup>1</sup> Respondent, in its Proposed Finding of Fact and Conclusions of Law, notes in footnote 2 that under the 2004 Reauthorization of the IDEA (Individuals with Disabilities Education Act), effective at the time the hearing was conducted, the party requesting the due process hearing shall not be allowed to raise issues in addition to the original request without the consent of the other party, and that School District did not agree to allow additional issues to be raised. Without considering whether this provision would apply to a due process request originating prior to the effective date of July 1, 2005, the chair finds issues 1, 2 and 4 to be a more specific listing of what was expressed in the original due process request and not additional issues. Since the 2005-06 school year had not begun at the time of the due process request, obviously this was not an issue contained in Petitioner's request. The last individualized education plan ("IEP") proposed by the School District was during the 2004-05 school year. There is no evidence put on at the hearing as to whether the School District had an obligation to Student to propose an IEP and educational placement for the 2005-06 school year beyond what the District had proposed in the prior school year and no argument was made by counsel for parents in their Post Hearing Memorandum of Law that raises issues relative to the 2005-06 school year. Parents must exhaust their administrative remedies for each academic year in which an IEP is challenged. *MM v. School District of Greenville County*, 303 F.3d 523, 536 (4<sup>th</sup> Cir. 2002); *Devine v. Indian River County School Board*, 249 F.3d 1289, 1292 n.2 (11<sup>th</sup> Cir. 2001). Consequently, the panel's decision is limited to the 2004-05 school year.

<sup>2</sup> This panel has no authority to award attorneys' fees or costs to the prevailing party. 20 U.S.C. § 1415(i)(3).

An eight day hearing was held in two stages, January 23-27, 2006 and March 27-29, 2006, in the administrative offices of the Respondent School District. The hearing was closed at Petitioner's request (Transcript at volume 1, p. 5, hereinafter "TR" followed by volume number colon (:) and then page number). Respondent's exhibits were all admitted by stipulation as were all of Petitioner's exhibits contained in Respondent's exhibits and all curriculum vitae of Petitioner's witnesses at hearing as well as P-71 and P-118 (TR 1:7-8). Admitted separately were Petitioner's exhibits P-25, P-43, P-49, P-50, P-52 (by stipulation), P-53, P-54, P-55, P-56, P-57, P-74, P-76 and P-77. Petitioners called the following witnesses to testify over the dates of January 23-27 and March 26, 2006: Dr. Amy Jackson, Jeanine Bradley, Wray Ann Williams, Christine Gustus, Beth Holstad, Angela Turner, Becky Durrell, Theresa O'Donoghue, Jean Moog, Petitioner and Dr. Mary Ellen Nevins. The District presented its case in chief on March 26-29, 2006 and presented the following witnesses: Berla Bieller, Susan Jenkins, Christy Smith, Deborah Harper, Sharon Burkey, Dr. Amy Jackson, and Dr. Chana Edwards. Petitioners called Mary Shortal on rebuttal and the District called Dr. Jackson on rebuttal.

### **TIME-LINE INFORMATION**

The initial deadline for issuance of the hearing panel's decision was on January 7, 2005. Petitioner requested an extension which the chair granted to February 6, 2005. Petitioner subsequently requested another extension which the chair granted to March 8, 2005 and another which the chair granted to May 7, 2005. A joint request for extension was made through August 31, 2005, which the chair granted. Another joint request for extension was made through October 10, 2005, which the chair granted. Petitioner made a subsequent request for extension of the hearing panel's decision to March 28, 2006, which was opposed by the Respondent but granted by the chair. At the conclusion of the first five days of hearing, the parties jointly requested a continuation of the hearing panel's decision through May 30, 2006. At the conclusion of the hearing, the parties made an additional joint request which was granted through August 1, 2006. Petitioner subsequently requested an extension of time through August 23, 2006, and then through September 6, 2006, which were not opposed, and granted by the chair. The School District requested an extension of time through September 18, 2006, unopposed, which was granted by the chair. This decision timely issues.

### **FINDINGS OF FACT**

While there is no issue before the panel of the adequacy of Student's education or the Respondent's compliance with the IDEA in that regard prior to the onset of the 2004-05 school year, the panel presents findings for background information.

1. This matter involves the education of Student, and is before the three-member hearing panel empowered by the Missouri Department of Elementary and Secondary Education pursuant to 20 U.S.C. § 1415 and R.S.Mo. §162.961.

2. Student was identified as a young child with a developmental delay ("YCDD") by the School District on January 10, 2003, when she was approximately 3½ years of age. The delays were in the area of speech and language (Stipulation TR 1:8, 12). The Student is a student

with disabilities for purposes of the Individuals with Disabilities Education Act (“IDEA”), 20 U.S.C. § 1400 *et seq.*

3. At the time of Student’s identification as YCDD, she lived within the jurisdiction of the Respondent Poplar Bluff R-1 School District with her parents (TR 5:28-31).

4. Student had a history of ear infections and received multiple sets of ear tubes which improved her hearing (R-1 at 1; TR. 5:9-10). Student’s hearing assessment conducted in January 2002 when Student was approximately 2½ years of age was determined to be within normal limits bilaterally (R-3 at 19; TR 5:10).

5. Also in January 2002, the parents had Student’s speech and language assessed by Judith Seawel, a speech and language pathologist (SLP) (R-1). Ms. Seawel concluded that Student demonstrated a slight delay in her expressive language skills due to reduced speech articulation but found her receptive language skills within normal limits and thus, no receptive language disorder was diagnosed (*Id.*) Speech therapy was recommended and four sessions ensued from February through April 2002 (R-3 at 32).

6. Because of her parents continuing concerns about Student’s speech and language development, Student was evaluated at Saint Louis University in October 2002 (R-3 at 19; TR 5:14, 81-82). In the area of auditory comprehension, Student received a standard score of 86 on the Preschool Language Scale-3 and her receptive language skills were good but she received a standard score of 74 in expressive communication (R-3 at 20-21; TR 2:28). The evaluator noted that Student’s oral motor mechanisms appeared adequate for speech and her clinical impression was that Student presented with a profound speech/phonological disorder and expressive language delay (R-3 at 22-23; TR 2:61). The evaluator did not diagnose Student with a receptive language delay or disorder but recommended speech and language therapy (R-3 at 23; TR 2:62) The evaluator further suggested that “consideration of a diagnosis of childhood apraxia should be further explored” (R-3 at 23).<sup>3</sup>

7. On or about October 14, 2002, Petitioner contacted Berla Bieller of the School District regarding Student’s possible receipt of special education services (R-1 at 4; TR 5:15; 6:166-67. Ms. Bieller is a psychological examiner for the District (TR 6:163). She has worked in that capacity for 15 years and, in that position, coordinates referrals for early childhood special education and serves on teams to develop evaluation plans and administers various assessments (TR 6:164). Ms. Bieller has a bachelor’s degree and a master’s degree in education, with an emphasis on guidance and counseling, and is certified by the State of Missouri as a school psychological examiner (TR 6:165).

8. On October 15, 2002, Ms. Bieller conversed with Petitioner and was informed that Student had a speech delay, but no other developmental concerns (R-1 at 6; TR 6:166). On October 22, 2002, Petitioner took Student to the District for a screening and was given a copy of

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<sup>3</sup> While not defined in detail by testimony, apraxia is a severe speech disorder characterized by inability to speak, or a severe struggle to speak clearly. Apraxia of speech occurs when the oral-motor muscles do not or cannot obey commands from the brain, or when the brain cannot reliably send those commands. [www.medicinenet.org](http://www.medicinenet.org).

the IDEA procedural safeguards (R-1 at 7; TR 6:169). Student failed the hearing screening and this was discussed with Petitioner who indicated that he would discuss the matter with Student's pediatrician (R-1 at 7; TR 2:69; 6:168-69). On approximately October 31, 2006, the District received a note from Student's pediatrician stating that her hearing was within normal limits (R-1 at 7; TR 6:169).

9. On November 15, 2002, a District multidisciplinary team developed an evaluation plan designed to assess whether Student was initially eligible under the IDEA (R-3; TR 5:15-16; 6:170). Because Student's pediatrician had informed the District that there were no concerns with hearing, the team did not evaluate in that area (TR 6:173-74). On or about November 18, 2002, Ms. Bieller corresponded with the family and requested their consent for the proposed evaluation and included a copy of the IDEA procedural safeguards; on November 25, 2002, Petitioner provided written consent for Student's initial IDEA evaluation (R-3 at 25-6; TR 6:173).

10. In December 2002, Student had her adenoids removed and bilateral ear tubes inserted (R-4 at 39, 44; TR 5:10).

11. On January 10, 2003, Student's multidisciplinary team convened to consider the results of her initial evaluation and to determine her eligibility under IDEA (R-4 at 39; R-5; TR 5:16; 6:174-76).

12. The following individuals were among those who participated in the January 2003 meeting: Christy Smith (who would be Student's early childhood special education teacher), Berla Bieller, Wray Ann Williams (the District's diagnostic assistant), Jeanine Bradley (who would be Student's SLP in early childhood special education), and Petitioner (R-4 at 39; R-3; TR 1:34; 6:174, 177; 2:138). At the conclusion of the meeting, Student's team concluded that she qualified for IDEA services under the category of YCCD (R-4 at 39; R-5; TR 1:8, 42; 2:140; 5:85; 6:175). Student's identified delays, at that time, were in the areas of communication, including speech and language, but not hearing (R-4; R-5; TR 1:40-1; 2:140, 6:176-79, 180-81). At the time, Student's expressive language was more of a concern than her receptive language (TR 7:33).

13. Also on January 10, 2003, the multidisciplinary team with the participation of Petitioner developed an initial IEP for Student in which all present concurred (R-4 at 39; R-6 at 68; TR 1:41; 6:181-82).

14. The present level of Student's performance, contained in the initial IEP, noted that Student's speech was very unintelligible which could impact Student's pre-reading skills and phonemic awareness, and also noted mild deficits in receptive language and severe deficits in expressive language (R-6; TR 1:71-72; 5:17). The IEP included goals and objectives in the following areas: articulation, phonology, receptive and expressive language, pre-academics, fine motor and adaptive behavior (R-6). The initial IEP proposed a placement that included 30 minutes per week of speech therapy and 30 minutes per week of language therapy in addition to 660 minutes per week of early childhood special education (*Id.*). At the conclusion of the meeting, Petitioner provided written consent to Student's initial placement in special education and was provided with a copy of the IEP (R-7 at 87; TR 1:41-42; 6:182).

15. Student's initial IEP was implemented at the District's Kinyon Early Childhood Center, in an early childhood special education classroom with an enrollment that consisted solely of children with disabilities, although the students spent some social time with their nondisabled peers (TR 1:42-43; 6:263; 7:32). The IEP recites that Student's communication skills make it difficult for her to be understood in a regular classroom environment (P-11 at 65). The IEP also notes that Student needed more one-on-one instruction in the area of communication (*Id.*)

16. At the early childhood level in the District, the placement continuum is separate and different from the placement continuum that is utilized for students in grades kindergarten through 12 as early childhood special education placement continuum options are based on where the services are delivered and not based on the amount of services, percentages or number of minutes (TR 6:253, 255, 261-63). The least restrictive of the early childhood placement options is the early childhood setting, which is considered the regular education setting. That setting is defined as a setting in which typical preschool children participate as part of a preschool educational environment and includes the District's Title I preschool class (TR 1:168-70; 6:253-54, 261-62).

17. Student made progress on the goals and objectives contained within January 2003 IEP (TR 1:42-43; R-6 at 73-80). Student's instruction was through Jeanine Bradley, the District's SLP, who provided speech and language therapy during the school year (TR 2:5-6, 31, 46-7; 7:31-2) and Christy Smith, special education teacher (TR 7:22, 24-6). Both are certified in their instructional areas (TR 2:42; 7:22). The Kinyon program provided one-on-one instruction for Student for the majority of the instructional time (TR 7:24-25). At hearing, Petitioner characterized the District's program as good and acknowledged that Student made progress, although he considered it to be slow (TR 5:19). He testified that, in his opinion, the District conducted an appropriate evaluation and he considered the staff's recommendations to be reasonable (*Id.*).

18. In January 2003, Student began receiving early childhood special education services from the District as a YCDD and continued to receive those services through July 2004 (Stipulation TR 1:8). During this time, Student was not diagnosed as a child with a hearing impairment and was served as a child with a disability under the IDEA that did not include a hearing impairment (*Id.*).

19. In April 2003, Student's hearing was evaluated at Audiology Associates in Cape Girardeau, Missouri, which determined that Student was hearing within normal ranges (R-16 at 156; R-18 at 166; TR 5:10).

20. On April 17, 2003, Student's IEP team convened to determine Student's eligibility for extended school year services (R-6 at 85). The team, including Petitioner, concluded that Student was eligible for such services from June 2 to July 31, 2003 (R-6 at 85-6; TR 2:31; 5:19) and she received 60 minutes of speech and language services weekly during this period (P-14 at 115-17).



21. During the 2003-04 school year, Student continued to participate in the District's early childhood special education program on a half-day basis and attended a day-care facility during the other half of the day (TR 2:26; 5:19) and continued to progress on her IEP goals (TR 7:41). Ms. Smith continued as Student's classroom teacher and Ms. Bradley continued to provide speech and language therapy to Student during this school year (TR 7:24-6; 2:46-47). During this time there was a 2:5 teacher-student ratio in the classroom (TR 7:27). The services provided by Ms. Bradley were between a 1:1 and 1:3 teacher-student ratio (TR 2:90). Ms. Bradley testified that, when she first began working with her, Student was very shy and quiet. (TR 2:52). However, by the end of 2004, Student appeared very confident going to speech and she spoke most of the time and was able to effectively communicate with her peers (*Id.*). From January 2003 to May 2004, Ms. Bradley observed Student speaking in longer sentences and displaying an increased vocabulary, although she still had speech articulation difficulties (*Id.*).

22. On December 19, 2003, Student's IEP team again convened for an annual review of her IEP, to develop a new IEP and to consider a change in her special education minutes (R-10 at 92-94; R-11 at 95; TR1:47; 5:20). The following were among those who participated in the meeting: Petitioner, Christy Smith, Sally Clark (Title I regular education teacher) and Jeanine Bradley (R-11 at 95; TR 2:31, 48; 5:20; 7:61-62). Student remained educationally categorized as YCCD due to speech and language concerns (R-11 at 96). Student did not have a diagnosed hearing impairment at the time (R-11 at 97). The December 2003 IEP included goals and objectives in the following areas: pre-academics, time, speech articulation, and receptive and expressive language (R-11 at 98-102, 104). The IEP notes that Student continued to need more individualized instruction in the area of communication and a lower teacher-student ratio to facilitate instruction (P-15 at 130). The IEP further noted that disruptions and distractions in the regular pre-school classroom setting would interfere with academic performance (*Id.*).

23. At that meeting, the team discussed the progress that Student had made as reflected in the IEP present level of educational performance and whether Student should spend time in a Title I classroom with typical 4 year old peers for socialization in anticipation of kindergarten (R-10 at 93; TR 1:48-50, 170). Ms. Smith and Ms. Bradley thought Student needed to be around same age peers in the regular education setting who could serve as good speech and language models (TR 2:49, 7:35). During the meeting, Petitioner expressed uncertainty about sending Student to kindergarten during the 2004-05 school year, but did agree that Student should be integrated with the peers in the Title I classroom (R-10 at 93). The team agreed to wait until April 2004 to discuss kindergarten (*Id.*). At the conclusion of the meeting, the team agreed to change Student's placement by reducing her minutes in special education and increasing her time in regular education through the use of the Title I classroom (R-10 at 93-94; R-11 at 103; R-11 at 111-12; TR 7:35). Petitioner waived the 10-day waiting period and requested that the change be implemented immediately (R-10 at 94). At hearing, he testified that he agreed to more time in regular education because it was what the staff recommended and he was relying "on their expertise" (TR 5:78). The IEP proposed a placement of 71% of the time in special education with the remainder of Student's school day in the Title I classroom (R-11 at 103, 106, 111-12; TR 2:49; 5:20; 7:35).

24. In January 2004, Student began attending the Title I classroom with her nondisabled peers for 45 minutes per day during the children's social time (TR 2:96; 7:26, 36,

54). Student continued to attend a daycare facility in the afternoons (TR 2:26; 5:73-74). Student showed no reluctance to attend the Title I classroom and enjoyed her time in that setting; however, Ms. Clark stated that Student's disability initially "kept her from being social" with other children in the class and only after a full semester did Ms. Clark begin to see Student verbalizing words to her and some of the other children (TR 7:36, 67; P-21 at 195). On those days that she did not receive speech-language therapy, she received services in Christy Smith's classroom for approximately one hour and 45 minutes (TR 7:54). Ms. Smith and Ms. Bradley testified that in their opinion Student received benefit from being in the Title I classroom (TR 2:50; 7:41)

25. Student made progress with the goals and objectives of the December 2003 IEP (TR 7:35). Her progress was defined by Ms. Bradley as "slow and steady" (TR 2:97). Ms. Smith testified that Student made progress in speech and language although she could still be hard to understand at times (TR 7:41, 68).

26. On April 2, 2004, Student's IEP team convened to discuss extended school year services for summer 2004 (R-11 at 109; R-12 at 113-14; TR 2:102; 7:36). Student was again deemed eligible for extended school year services and she was to receive 30 minutes each of speech therapy, language therapy and writing weekly from June 1 to the week of August 1, 2004. (TR 2:141-2). During the meeting, Petitioner stated that he wanted Student to start kindergarten a year late and the District agreed that Student could remain in the early childhood special education setting for an additional year. (TR 1:53; 2:74). The team agreed, in part, because of Student's late birth date and her lack of maturity (TR 2:74-75, 99). Although Ms. Smith believed that Student was ready to transition to kindergarten, she went along with the team decision to honor the parents' wishes (TR 7:37, 55, 58, 84).<sup>4</sup> During this meeting, the team also discussed meeting again in August 2004 to reduce Student's special education minutes and to increase her speech-language therapy minutes (TR 2:97-100; 7:38). Ms. Smith testified that she was going to recommend in August that Student's time in her special education classroom be reduced to 30 minutes to one hour per day so that her time in regular education could be increased (TR 7:38).

27. During the summer of 2004, Student attended extended school year services at the District's early childhood center where she received some services from Wray Ann Williams, a District paraprofessional (TR 1:53, 55, 197; 2:141, 5:21). During the summer, Ms. Williams became concerned about Student's hearing (TR 2:142-43). As a result, Ms. Williams discussed the situation with Student's father who initially questioned Ms. Williams' assessment since Student had been evaluated for hearing loss several times previously (TR 2:142, 152). Student was diagnosed with a hearing impairment on July 12, 2004 (Stipulation TR 1:7). Student returned to the summer program on the last day of summer school, during the week of August 1, 2004, with a hearing aid in her right ear (TR 2:147-48; R-20 at 177). At that time, Petitioner and Ms. Williams discussed what resources might be available. Petitioner did not indicate that he was looking for a private school for Student at that time or that a move was contemplated

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<sup>4</sup> There was testimony at the hearing that the parents had also had discussed the possibility that Student might be enrolled in the local parochial school for half a day during the 2004-05 school year instead of the early childhood program at the District (TR 2:75; 7:37-8). Of course this is not relevant to the District's obligations to the Student at this time.

to St. Louis (TR 2:157-58). Ms. Williams testified that the person she and Petitioner spoke with talked about hearing aids, not Moog or other schools (TR 2:158). Petitioner testified that he asked Ms. Williams about her knowledge of schools for the deaf or schools in St. Louis and Ms. Williams introduced him to this parent (TR 5:33-4). Petitioner testified that he spoke to this parent about “hearing aids and different options” and that Ms. Williams was only there for part of this conversation (TR 5:33). Ms. Williams also testified that she spoke to Student’s mother around August 8, 2004 and mother advised that the family would be touring schools in St. Louis but that the family did not know what would be done about Student’s education (TR 2:160). After the school year began, mother had a second conversation with Ms. Williams but according to Ms. Williams’ testimony, mother did not mention Moog (TR 2:161). Petitioner testified that he did not communicate the new diagnosis to anyone else at the District during the summer (TR 5:124).

28. Student’s hearing loss was diagnosed by Linda Hurt, a private audiologist in Poplar Bluff, on July 12, 2004 (TR 5:24-25; P-8 at 22). The diagnosis of a profound to severe hearing loss in the left ear and moderate hearing loss in the right ear was confirmed at St. Louis Children’s Hospital on July 14, 2004 (*q.d.*). A prescription was written for a hearing aid for Student’s right ear; the profound loss in the left ear was too severe to be remediated by a hearing aid (TR 5:23). According to Petitioner, Children’s Hospital recommended a full-time self-contained classroom for Student to receive deaf oral education, and suggested the names of several schools, including Moog (TR 5:25, 29; P-8 at 22).

29. Petitioner testified that after Student’s diagnosis in July 2004, that the situation was “literally a panic” and the family was “exploring any option possible” (TR 5:129). Petitioner testified the family was looking at schools in St. Louis and “knew the option of the Poplar Bluff schools here” (TR 5:28) but knew that “there just wasn’t a comprehensive program down there” (TR 5:126) and had the “general idea is that they [Poplar Bluff schools] did not have an oral deaf educational program” (TR 5:94). While Petitioner testified that the decision to place Student at Moog was not made until the Friday before school started in the fall (TR 5:125), neither parent contacted the District to formally request a reevaluation or an new IEP or to inquire as to services available through the School District before Student was enrolled at Moog on August 23, 2004 (TR 5:94-5); Petitioner further stated that while “scrambling to check out all of the options” that “we didn’t need to tell the local school all the things we were doing” (TR 5:126-7).

30. On August 9, 2004 and September 1, 2004, the family had Student’s speech and language evaluated by Dr. Carol Ludwig, a private SLP (R-15; TR 5:26). In her report, Dr. Ludwig wrote that Student had been diagnosed with a profound sensorineural hearing loss in the left ear and a moderate/severe sensorineural hearing loss “in the past year” and had been fitted with “binaural 100% digital hearing aids” (R-15); although Petitioner reported that only a hearing aid for the right ear was obtained since the loss in the left was too severe for any hearing aid benefit (TR 5:26). A hearing loss of this nature is permanent in contrast to a conductive loss which can be remediated (TR 7:295-7). Dr. Ludwig diagnosed Student with verbal apraxia and recommended daily speech and language rehabilitation through a speech-language pathologist (R-15 at 151).

31. On August 13, 2004, Student's cognitive ability was assessed at Moog (R-16 at 156; TR 2:203, 285). Moog staff administered the Wechsler Preschool and Primary Scale of Intelligence (WPPSI) (R-16 at 156). Moog administers this test as a prerequisite to admission as Moog does not accept hearing impaired or deaf children with cognitive delays (TR 2:285-86; 3:33, 190). The report states that Student's performance IQ (intelligence quotient) on the WPPSI was a 96 and her verbal IQ was a 74 (R-16 at 157-8). According to the Moog report, the performance IQ should be viewed as the true measure of a hearing impaired child's learning potential (R-16 at 157).<sup>5</sup>

32. In mid-August 2004, after returning to the District in preparation for the school year, Christy Smith, Student's designated classroom teacher, was informed of Student's hearing loss by Wray Ann Williams or Jeannine Bradley but anticipated that Student would return to her early childhood program as discussed in April 2004 (TR 7:42). On August 18, 2004, a day or two after learning of Student's hearing loss, Ms. Smith telephoned the Student's home to schedule a date with parents to enroll Student (R-13 at 116; TR 7:42, 77-78).<sup>6</sup> During that conversation, Ms. Smith was informed by the family's housekeeper or nanny or "somebody" that Student would not be returning to the District, but that Student might be going to school in St. Louis (TR 7:43, 77-78; Ex. R-29 at 313). Ms. Smith didn't recall if she asked the person who answered the phone to have a parent call her back (TR 7:81). Ms. Smith testified that the hearing loss would not necessarily change Student's educational needs as it depends on the correction afforded by hearing aids (TR 7:76). Usually, a new IEP meeting when needs change is generated by parental request (TR 7:77).

33. On August 19, 2004, Student's mother signed a release of records form to give the District permission to release records to "2 different schools" with respect to a possible move and transfer (R-16 at 154; TR 6:237-38, 245-47). According to Petitioner, the family requested records because both Moog and St. Joseph's Institute for the Deaf had requested such records (TR 5:33). When Student's mother picked up the records, she informed Ms. Bieller that the family was considering a move and 2 different schools for Student; however, she did not specifically mention Moog (TR 6:238-40, 246-47). Student's mother did not state to Ms. Bieller that the parents were expecting the District to pay for either of the two schools under consideration (TR 6:248).

34. On August 26, 2004, Student's parents enrolled her Moog (Stipulation TR 1:7-8; TR 5:30). Prior to that date, the parents did not notify Dr. Jackson or anyone at the District that they were going to place Student at Moog (TR 1:198; 6:259). At hearing, Petitioner acknowledged that he and his wife received copies of the IDEA procedural safeguards from the District and were capable of reading and understanding those safeguards (TR 5:64). However, he only skimmed those safeguards until after an IEP meeting in November 2004 (TR 5:64). Although he received the safeguards prior to Student's enrollment at Moog, he did not inform the

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<sup>5</sup> According to the School District's psychological examiner, Berla Bieller, Moog did not administer the WPPSI in a manner that would have provided a full-scale IQ score (TR 6:187). This would require administration of 3 core subtests in the verbal area, at least 3 core subtests in the performance area and at least one subtest in processing speed (TR 6:188). According to Ms. Bieller, a full scale IQ score is significant as a measure of cognitive ability and is often used to determine eligibility for special education services (*Id.*).

<sup>6</sup> For the program in which Student was placed, Ms. Smith schedules meetings before school begins to "refill our enrollment papers" (TR 7:42). Apparently, a student just doesn't show up on the first day of school and attend.

District that he was going to place her at Moog and did not, prior to placing Student at Moog and within 10 business days of that enrollment, notify the District in writing that he was going to place her there and seek reimbursement for that placement (TR 5:64-65).

35. The Moog Center for Deaf Education is a not-for-profit private school located in St. Louis, Missouri, about 150 miles from Poplar Bluff, and serves only hearing impaired and deaf children between the ages of birth to 9 (R-52; TR 2:178-81, 334; 5:30). The Moog Center is a Missouri Department of Elementary and Secondary Education (MDESE) approved private agency and, thus, public schools are permitted to contract with Moog for a child's education (TR 2:179). At the time of hearing, the Moog Center had approximately 35 children in its 3-9 year-old program and 25 children in the birth to three program and of those children, only 10 were placed through public school contracts with the rest parentally placed (TR 2:179, 268, 273; 3:78-79). Approximately 75% of the Moog students have cochlear implants and the rest have hearing aids (TR 2:179-80). Moog was built for hearing impaired children and steps have been taken to avoid static electricity and to reduce or eliminate noise (TR 2:190-93, 295-96). Recess, however, is outside where the acoustical environment cannot be controlled (TR 2:292-93). During recess, students wear their hearing devices and are able to effectively communicate with one another (TR 2:195, 293). Although the Moog Center employs speech-language pathologists, only about 8 students receive their speech-language services through the SLPs. The rest receive their speech services through the classroom teachers (TR 2:268).

36. Moog provides an intensive individualized program where the focus is on oral communication and providing deaf children the opportunity to learn to speak and to understand the speech of others commensurate with that of their typical peers (TR 2:179-80, 343; 3:5; 4:52; R-52). Most of the staff has been trained in teaching deaf children to talk and most have masters of education degrees in hearing impairments (TR 2:185). All of the classroom teachers are certified by the State of Missouri in deaf education (TR 2:186), and many have a great deal of training and experience with oral deaf children using cochlear implants (TR 2:186). Moog also has 3 audiologists on staff, responsible for ensuring that the students' hearing devices are properly working (TR 2:188). Speech, language and auditory training<sup>7</sup> are integrated throughout the entire day and across all curriculum subjects, including lunch and recess (TR 2:188, 194-5).

37. Moog staff testified that children with hearing impairments do not acquire language the same as do their typical peers (TR 2:183). Normal children absorb language simply by being in the world and by talking whereas hearing impaired children need direct instruction to learn to speak and to learn to listen through whatever device they have (*Id.*). Moog staff testified that when their students mainstream, they want their language to be commensurate with their normal hearing peers (TR 2:196-97). Mainstreaming generally was defined by Moog to mean a regular education classroom (TR 4:138). Moog does encourage the children who attend there to participate in outside activities with typical peers (TR 2:198-99).

38. Moog staff prepares what it describes as "IEPs" for the children who are parentally placed but acknowledged at hearing that these IEPs may not be consistent with IDEA requirements (R-26 at 238; TR 2:303-19). The Moog IEPs consist of assessment forms and

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<sup>7</sup> While not specifically defined for the panel, from usage of the term at the hearing, the auditory training refers to teaching the child to hear, *i.e.*, how to listen.

checklists such as the TASL (Teacher Assessment of Spoken Language), the TASSK (Teacher Assessment of Speech Skills) and the Jump Start: An Accelerated Approach for Auditory Training (TR 2:303-15). Each IEP contains these same assessment instruments and are individualized by marking appropriate boxes to indicate which of the standard goals will be worked on for that particular child and/or which goals have been attained (TR 2:303-15; 3:7-8). An accompanying manual determines the criteria and how to assess whether those criteria have been met (TR 2:318-19; 3:74).

39. Children in Moog's 3-9 year old program generally follow the same basic daily schedule that includes speech, auditory training, language, reading, math, choice time, recess, some science and/or social studies, and physical education (TR 2:189-90; 279-80; 4:86, 93, 100, 145). Each class period is 30 minutes in length and the class sizes range from one child to 9 to 10 children (TR 2:183, 189). Children are grouped according to ability and attend class in small group settings of 2 to 3 students per deaf education teacher for core curriculum and language classes, with learning center instruction in larger groups for other classes (TR 2:183, 187). According to Moog staff, teachers are constantly fluctuating between correcting speech, teaching language and providing auditory training to the individual students (TR 4:169-70). According to Jean Moog, founder and director of Moog, this instruction is "a lot more difficult for people to do than it appears" as the teachers "need to listen to what words are said, what words are omitted, what words are in... incorrect word order or just aren't correct for it. And they have to listen to the speech of it, the articulation of all of this. And then in a split second, they have to make a decision about how they are going to model it in order to get an improvement either in the speech or the language or both" (TR 4:169-70). The Moog staff makes it look easy according to Ms. Moog, "because the teachers do it quite easily" (*Id.*).

40. The Moog school building was built specifically for hearing impaired children and contains special soundproofing accommodations, including the bulletin boards and windows (TR 2:191). The ventilation system, lights and carpet are designed to reduce noise and static electricity, which can damage cochlear implants (TR 3:136-7; 2:191-2).

41. According to Moog principal Christine Gustus' testimony, approximately 80-90% of the total number of Moog students since its founding have returned to their home school districts in mainstream settings (TR 2:196-7). Approximately 50% of Moog students are able to be mainstreamed back to their home schools before kindergarten (TR 4:227). The amount of special education required for the Moog students in their home districts is approximately one hour per day, generally for speech and pre-teaching vocabulary in preparation for lessons (TR 2:197). No graduate of Moog has returned to their home district needing a one-on-one aide or sign language interpreter (TR 2:197-8). Moog works with the home districts to prepare for the return of the hearing impaired student (*Id.*).

42. At the time of her enrollment at Moog, Student and her father began residing in St. Louis, Missouri, during the school week (TR 5:6). They leave Poplar Bluff on Monday mornings at around 5:30 a.m., spend the week together in St. Louis, and return to Poplar Bluff on Friday afternoons (TR 5:6, 30-31). As a result of this relocation to St. Louis, Student and her father are apart from their mother and wife and Student's siblings and that has continued to be difficult for them (TR 5:32). At times, Student's father's work requires him to travel during the

week and when he does, arrangements must be made for Student's care through grandparents or another individual (TR 5:68). Because of their increased one-on-one time together, Student's father is able to simulate some of Moog's methods at home, which has benefited Student (TR 5:66, 68).

43. On Friday, August 27, 2004, Dr. Jackson's secretary received a call from Petitioner, which call was returned by Dr. Jackson on the following Monday, August 30, 2004 (TR 1:179-80; 5:34). During that conversation, Petitioner informed Dr. Jackson that Student was attending Moog and he asked if the District would contract with Moog (TR 1:94, 180; 5:34, 92-94). Dr. Jackson informed Petitioner that Student's IEP team would have to convene to consider his request for a change of placement and asked if he would like the District to schedule an IEP meeting (TR 1:94, 182; 5:34; R-29 at 313). After Petitioner indicated that he would like a meeting, Dr. Jackson informed him that the District would send him a meeting notification (TR 1:182).

44. At the time of hearing, the District had 7 hearing impaired students and one deaf student attending, none of whom had a cochlear implant (TR 1:70-71). The District also has no defined "deaf education" program (*Id.*). Each of the District's hearing impaired or deaf students was being mainstreamed or included in regular education to some extent (TR 1:171). Dr. Jackson testified as to her understanding of FAPE requiring education to be provided in the least restrictive environment (LRE) (TR 1:172).

45. On August 30, and September 3, 2004, the Moog Center completed an educational evaluation of Student which was provided to the District on September 17, 2004 (R-25 at 225; TR1:185-86; 2:230; 3:27). The evaluation included assessment of Student's receptive language (the language a child comprehends) and her expressive language (the language a child produces) (TR 2:232). On the Clinical Evaluation of Language Fundamentals-Preschool (CELF), Student's overall receptive language skills were below the average range compared to normal hearing children, as was her receptive vocabulary; expressive language skills and vocabulary were also below the average as were speech skills (R-16; Ex. R-25 at 225-26; TR 2:233-24, 349-50). One recommendation of the report was the Student's receipt of daily speech instruction from a SLP (R-25 at 230; TR 3:29). Ms. Christine Gustus, Moog principal, testified that at the time of the report, the Moog staff was just getting to know Student and after enrollment, with consultation from an SLP, determined that Student's apraxia diagnosis was not as severe as indicated in Ms. Ludwig's report and that daily services from an SLP were not necessary (TR 3:30).

46. On September 9, 2004, Dr. Jackson sent Petitioner a notification to his Poplar Bluff address for an IEP meeting for September 24, 2004 (R-16 at 153,164; TR 1:182-83, 194). The notification indicated that the purpose of the meeting was to consider a parent request for a change of placement, to develop an IEP, if necessary, to review any existing data and to discuss a reevaluation (*Id.*)

47. Student's IEP team met on or about September 24, 2004, to consider the parents' request for a change of placement to Moog (R-17; TR 1:190-91; 7:82); however due to Student's mother's failure to forward the notice to Petitioner, Petitioner did not attend and neither did

Student's mother and the meeting adjourned (TR 1:191; 5:36). Petitioner subsequently contacted Dr. Jackson and provided his St. Louis address for purposes of future notifications and requested the ability to participate in the next meeting by telephone (TR 1:192). A new IEP meeting notification was then sent, for a meeting on October 11, 2004, including notice of procedural safeguards (R-20 at 176; TR 1:95, 193; 2-103).

48. On October 11, 2004, Student's IEP team convened (R-20; TR 1:194; 5:36). Petitioner and Moog staff participated by telephone and the District was represented by Berla Bieller, Dr. Jackson, Christy Smith and Jeanine Bradley (*Id.*). The District proposed a reevaluation because of Student's now diagnosed hearing impairment and the request for the change to a private placement (R-20; TR 1:195; 2:103). Petitioner provided consent (R-20; TR 1:195; 5:88). The team did not change Student's IEP or placement (R-20; TR 1:195-6) although Petitioner requested a change of placement to Moog (TR 5:37). The District did not agree to a change in placement since the Student was still diagnosed for IEP purposes as YCDD and not a child with a hearing impairment and the District did not believe Moog to be Student's LRE (R-20 at 182; TR 1: 97, 100, 196, 199-200; 5:37). Dr. Jackson testified that the District did offer to provide services to Student pending the reevaluation period during the IEP meeting (TR 1:200).

49. In October 2004, Student suffered another dramatic loss of hearing in her right ear (TR 2:278; 5:39). Moog audiologist Beth Holstad confirmed the hearing loss (TR 5:40). Student's hearing loss reached a plateau after an additional 40 decibel loss, requiring a stronger hearing aid (TR 5:41-2). Ms. Holstead contacted Dr. Randall Clary at Children's Hospital for an evaluation for a cochlear implant and Dr. Clary subsequently determined Student eligible (R 5:42). The parents believed a cochlear implant and oral education to be the best option for Student (TR 5:54) and surgery was scheduled in January 2005.

50. A Moog IEP was developed for Student on October 14, 2004 with the participation of Petitioner, Mary Shortal (the Moog coordinator) and Becky Durrell (one of Student's Moog teachers) (R-26 at 239; TR 4:15, 21-23).

51. During November 2004, the District conducted its reevaluation and Student wore her hearing aid during the testing (TR 1:101; 2:64; 6:205-06). Jeanine Bradley, SLP, tested Student in the speech-language area and observed little or no change in Student's speech-language skills from the last time she had seen her in May (TR 2:64-65; 1:230-2). She also reviewed Student's results on the Comprehensive Assessment of Spoken Language ("CASL") test and stated that the Student's biggest problems on the CASL were with antonyms, basic concepts and syntax construction, which she cited as examples of expressive and receptive language skills and comprehension (TR 2:23-24). Christy Smith administered the Wechsler Individual Achievement Test-II (WIAT) to assess Student's academic achievement (R-28 at 302; TR 6:203-06). On the WIAT, the standard scores have a mean of 100 with a standard deviation of 15 (R-28 at 302; TR 6:204-05). Student achieved a standard score of 108 in word reading, a 94 in mathematics reasoning, an 85 in spelling, a 91 in listening comprehension<sup>8</sup> and a 94 in oral expression (R-28 at 303). The only standard score that was more than 1 standard

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<sup>8</sup> The listening comprehension component of the WIAT is administered verbally, incorporates receptive language ability, and requires the student to have some auditory skills (TR 6:205-06). The oral expression subtest involves the ability to express wants and needs through verbal or oral answers (TR 6:206).



deviation below the mean was in numerical operations (*Id.*). The tests reflected average performance in all areas except numerical operations (TR 6:205-06).

52. On November 10, 2004, the District provided the parents with a meeting notification for a meeting scheduled for November 22, 2004 which informed the parents that the purpose of the meeting was to discuss the reevaluation, to consider a change of placement, and to develop an IEP for Student if necessary (R-24 at 220). Prior to that meeting and with Petitioner's permission, the District requested and received a copy of the Moog IEP (R-23; TR 1:133, 136, 204). Dr. Jackson testified that in so requesting, the District was hoping to obtain information that would assist the team in the development of Student's IEP and programming (TR 1:204). Dr. Jackson's testified that in her opinion, the Moog IEP was not IDEA compliant and did not contain the type of information that the District needed to develop an IDEA compliant IEP as it lacked specificity about where Student was functioning "as far as each area in the development of the goals, etc." (TR 1:205).

53. On November 22, 2004, the District's IEP team convened to discuss the reevaluation results and to develop a new IEP for Student (R-27; R-28; R-29; TR 1:72, 203; 5:44. Petitioner and members of the Moog staff participated by telephone (TR 5:44; R-27). The participants included the following: Christy Smith, Jeanine Bradley, Dr. Amy Jackson, Berla Bieller, Debbie Harper, Petitioner, Mary Shortal, Christine Gustus, and Jean Moog (R-27). The District kept and maintained written meeting notes, the accuracy of which was disputed by some Moog witnesses at the hearing (R-27; TR 1:72; TR 2:217). Initially, the team discussed the reevaluation (R-27; TR 1:72). There was some discussion of the IQ test that Moog had administered and the interpretation of those scores (R-27; TR 2:324-27; 6:189-92). According to the meeting notes and in response to that discussion, Ms. Moog stated that Moog would have given the Leiter IQ test had it known that the District did not use the performance IQ as a true measure of a hearing impaired child's intelligence (R-27 at 261; TR 3:178, 210). The signature page for the evaluation report indicates that the entire team agreed that Student's new IDEA educational diagnosis should include hearing impaired/deafness, sound system disorder, and language impairment (R-28 at 310).

54. The team then proceeded to develop a new IEP (R-29; TR 1:235). During that part of the meeting, the meeting notes reflect that District staff raised the fact that Student was not just a hearing impaired student and that her IEP needed to address other delays that were present before and after she became hearing impaired (R-27 at 264). The team had some disagreement with respect to the goals and objectives to be included in the IEP (TR 1:236-27; 2:207-213). Christine Gustus believed that the District's goals showed a lack of experience with young hearing impaired students with hearing aids (TR 2:212). Ms. Gustus testified that she believed the focus of the District's goals to be inappropriately on academics and not the language associated with academics (TR 2:208). Moog staff also raised concerns with the District's articulation goals (TR 2:213). According to Ms. Gustus, after Student's hearing loss, she did not have access to high frequency sounds and they would not have been targeted sounds to work on during speech class prior to the cochlear implant; however if the sounds come up in language, Moog tells the student that the sounds are there and models them so the student can imitate the sounds (TR 2:210). Ms. Gustus also disagreed with the extent of the oral-motor practice goal, Student's responsibility for hearing aid (Ms. Gustus believed Student was too young), limitations

of the receptive language goal, and the apparent confusion of the District between phonemic awareness through reading and the auditory or listening goals (in response to Moog's concerns, this goal was revised) (TR 2:208-214; R-27 at 263-4). Overall, Ms. Gustus believed that the language objectives and goals were limiting and if only that much progress was made, Student would never catch up with normal hearing peers (TR 2:218). According to the meeting notes and Ms. Bieller's testimony at hearing, District staff stated at the meeting that they would be willing to accept recommendations from Moog as they had not seen Student in some time and that while Moog staff expressed a willingness to fax additional goals after the meeting, Ms. Gustus subsequently sent a facsimile to Dr. Jackson declining to do so (R-31 at 344; R-27; TR 1:233; 6:251-52).

55. The November 22, 2004 IEP includes goals and objectives in the areas of pre-academics, oral motor movements for speech production; articulation/speech, awareness and responsibility for hearing aid, receptive language, speech motor planning skills, expressive language, morphology, math, reading, writing, and audition (R-29; TR 1:235; 2:132; 7:45). The November 22, 2004, IEP recites present level of performance and a list of accommodations for regular education. Ex. R-29. The IEP also includes transportation as a related service, an FM system (auditory trainer)<sup>9</sup> (R-29 at 337; TR 1:118), four audiological checks for term of IEP, and a full-time facilitator (aide) to assist Student (R-29). The IEP proposes a placement in a full-day kindergarten program,<sup>10</sup> with 30 minutes per day of specialized instruction in math, 30 minutes per day of specialized instruction in reading, and 60 minutes per day of 1:1 or small-group instruction in speech/audition and language in a special education setting (R-29 at 329). Student was to spend 35% of the school day in special education and 65% of the day in regular education with supports, accommodations and modifications (R-29; TR 1:103-05). The IEP does not include the names of the implementers or the individuals who will provide services to Student (TR 1:115, 243). The team did consider placement at a private separate day school facility (R-29 at 332) but rejected Moog because District staff believed the placement to be too restrictive (R-34 at 350; TR 1:224). At the conclusion of the meeting, Petitioner told the team that he disagreed with the proposed placement and asked about his options and he was informed about his rights pursuant to the procedural safeguards (R-27; TR 5:49-50). The meeting notes do not reflect that Petitioner requested any additional special education services within the District (R-27) and Petitioner confirmed that he made no specific requests (TR 5:99; 6:250). District witnesses who testified who were involved in this IEP process, testified that they believed the implementation of the IEP would provide FAPE to Student (TR 1:223 - Jackson; TR 2:66 - Bradley) or that they agreed with the placement (TR 7:137 - Burkey).

56. Petitioner outlined the reasons for rejecting the November 22, 2004 IEP in a letter to Dr. Jackson dated November 22, 2004, which was included as an exhibit to the due process request (R-29 at 340). Petitioner stated that he was rejecting the IEP because: Student's hearing issues require a specially trained team not available at the District; the IEP includes goals that ignore the limitations of the hearing loss; Student's IQ assessment showed a lack of understanding of the use of the test for deaf children; the IEP goals ignore the need for

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<sup>9</sup> An auditory trainer is an FM device that amplifies the sound of a hearing aid or implant (TR 1:118-19).

<sup>10</sup> The district proposed a full-day kindergarten placement in the November IEP since Moog was treating Student as a kindergarten student; however, the district originally intended to keep Student in the early childhood program at parental request (TR 1:244; 7:47).

continuous integrated speech and language; audiology services are not available in Poplar Bluff to manage sudden hearing changes, equipment maintenance and other acute audiology needs; the School District and local audiologists do not understand cochlear implants and their management; and the District refused to consider the impact of the scheduled cochlear implant surgery (*Id.*).

57. Kindergarten students in the District are housed in a separate kindergarten building where there are approximately 15-20 regular education classrooms (TR 1:166). At the kindergarten level, the District has assigned one speech-language pathologist and one speech implementer to serve those students' special education needs (TR 1:169). In each elementary building, the District has two speech-language pathologists assigned to deliver services (TR 1:169). The District does not determine which teachers or therapists will work with which child until the beginning of a school year (TR 1:169). Dr. Jackson testified as to her understanding under the IDEA that the District is not required to and does not indicate the specific person who will be delivering IEP services to a student (TR 1:170).

58. Ms. Bradley testified that she believed the goals and objectives of the November IEP to be appropriate based upon the information the IEP team had and that had Student returned to the District, in her opinion Student would have received educational benefit under the IEP (TR 2:66). She testified that the goals and objectives were designed based upon the Moog records (TR 2:110-11). She testified that the Moog techniques were not different than the strategies she had employed herself (TR 2:111). She testified that she believed that participation in regular education classes would give Student good language role models and that Student could get comfortable in the regular classroom environment (TR 2:67).

59. Debbie Harper was one of several kindergarten teachers who might have been designated as Student's kindergarten teacher had Student returned to the District during the 2004-05 school year (TR 1:106, 167; 2:117-18; 7:103-04). Ms. Harper has twenty years' experience in teaching and has attended workshops on educating children with hearing impairments and has had such children in her classes previously (TR 7:95-8). She has the required Missouri certification for her position (TR 7:97). She has had training on working with hearing impaired children (TR 7:97-8). In the last two years, Ms. Harper has had students in her regular education classroom with personal aides and Ms. Harper was able to instruct those students with the aides present (TR 7:100-01, 109). She testified that, in her classroom, the focus throughout the day is on language acquisition and her classroom schedule is arranged in such a way that she is able to spend 1:1 time with any child who requires that (TR 7:108-09, 114). Ms. Harper attended IEP meetings for Student even though she had not met her or taught her (TR 7:135). Ms. Harper has used an FM system for a student in the past (TR 7:106). She testified that she had no concerns about Student's ability to participate in her classroom activities (TR 7:108).

60. Sharon Burkey is the speech-language pathologist assigned to work with kindergarten-aged students, and she testified for the District (TR 1:106, 128; 2:118; 7:149). At the time of hearing, Ms. Burkey had four years' of experience in the public schools (TR 7:142). She has the required Missouri certifications required for her position (TR 7:142). During her undergraduate and graduate training, Ms. Burkey had training on educating children with hearing

impairments and she has attended workshops on educating students with cochlear implants (TR 7:143, 167-70). During her four years of professional experience, Ms. Burkey has worked with children with hearing impairments who are oral, but has not worked with a child with a cochlear implant (TR 7:143-44, 158-59, 165-66). Ms. Burkey testified that a hearing impaired child's experience determines how that student acquires language and the age at which the child suffers a hearing loss is a key factor in language acquisition (TR 7:144). Because the most important time in language acquisition is from 18 months to two years of age, a hearing loss during that stage can be very detrimental to language development (TR 7:145-46). Ms. Burkey testified that in contrast, if a child loses hearing at a later age, the child may have already acquired a large part of her language, and the impact of the hearing loss on language acquisition might be less detrimental (*Id.*). Further, when a hearing impaired child has access to sound through a hearing aid or cochlear implant, that factor also will impact the student's educational program (TR 7:147, 177). In Ms. Burkey's opinion, it is important for hearing impaired children to have typical children as speech and language role models and for imitation and socialization and she believes that some time in regular education would benefit Student's language (TR 7:152, 191-92). Although teachers are better language models for hearing impaired students because they give a correct model, other students can assist in expanding a hearing impaired student's language. Ms. Burkey had not met Student, but she attended IEP meetings for Student in January and March 2005 (TR 7:146, 148-49, 172-74, 183-85). Had Student returned to the District, Ms. Burkey would have provided therapy for speech, language and audition (TR 7:159).

61. On December 2, 2004, the District sent Petitioner a copy of the November 2004 IEP and a written notice of action refusing the requested change of placement to Moog (R-33 at 348, 350; R-34; TR 1:254-55). In addition, the District sent a notice of action refusing to revise Student's IEP to address her cochlear implant needs since the request was premature (R-33 at 349; TR 1:254-55). That notice indicated that the team would reconvene after her implant surgery to address what revisions, if any, might be necessary to the IEP (*Id.*).

62. On January 10, 2005, at the age of 5, Student had cochlear implant surgery with Dr. Randall Clary on her left ear (Stipulation TR 1:7; 5:50; P-10). According to the stipulation of the parties (TR 1:9-10):

The definition of a cochlear implant is a small, complex electronic device that can help to provide a sense of sound to a person who is profoundly deaf or severely hard of hearing. The implant is surgically planted under the skin behind the ear. An implant has four basic parts: 1) a microphone, which picks up sound from the environment; 2) a speech processor, which selects and arranges sounds picked up by the microphone; 3) a transmitter and receiver/stimulator, which receives signals from the speech processor and converts them into electronic impulses; and 4) electrodes which collect the impulses from the stimulator and send them to the brain. A cochlear implant does not restore or create normal hearing. Under appropriate conditions, a cochlear implant can give a deaf person a useful auditory understanding of the environment and help him or her to understand speech. A cochlear implant is different from a hearing aid. Hearing aids amplify sound. Cochlear implants compensate for damaged or non-working parts of the inner ear. When hearing is functioning normally, complicated parts of the inner

ear convert sound waves in the air to electrical impulses. These impulses are then sent to the brain, where a hearing person recognizes them as sound. A cochlear implant works in a similar manner. It electronically finds useful sounds and then sends them to the brain. Hearing through an implant may sound different from normal hearing. There are 22 electrodes on the cochlear implant. A cochlear implant requires full insertion of the device. There can be complications to the surgery of cochlear implantation including perioperative and long term.

The implant is initially stimulated 3-4 weeks after the surgery (TR 3:108). At that time, the audiologist gives the child the necessary external equipment and fits it to the child. Student's initial stimulation, or "mapping," was conducted over a 2 day period at the implantation site with the audiologist (TR 3:107). The audiologist creates "maps" designed for different listening environments, *i.e.*, quiet or noisy environments (TR 3:134). Student's device, a Cochlear America Sprint speech processor and headset, holds four different maps (*Id.*). After the initial mapping Student was seen by the audiologist once a month; now Student sees an audiologist once every 3 to 4 months (TR 3:133).

63. On January 11, 2005, Petitioner corresponded with the District and requested an IEP meeting since Student had her implant (R-36 at 359; TR 1:105-06, 256; 5:52). Upon receipt of that letter, Dr. Jackson called Petitioner and asked to have the meeting at Moog so that the school team could look at the school (TR 5:52; R-39 at 364). At hearing, Moog staff testified that they were unaware that the meeting was to be an IEP meeting (TR 2:335) as Petitioner had apparently failed to apprise Moog staff of this fact (TR 5:52-3).

64. On or about January 21, 2005, the District provided Petitioner with a written meeting notification for the meeting on January 24. The notification indicates that the meeting will be held at the Moog Center with the following purposes indicated: to review Student's IEP, to consider a change of placement at the parents' request, to develop an IEP, and to discuss the status of the cochlear implant and its programming implications (R-40 at 366; TR 1:256).

65. On or about January 24, 2005, Student's IEP team convened to conduct the meeting at the Moog Center. In attendance were: Petitioner, Dr. Amy Jackson, Jean Moog, Christine Gustus, Mary Shortal (Moog coordinator for ages 5-9), Angela Turner (deaf educator with the District), Christy Smith, Berla Bieller, Jeanine Bradley, Sharon Burkey, Charlotte Rowland (District special education teacher), Debbie Harper and Teri Goldman, attorney for the District (Ex. R-40 at 368). Initially, Moog staff took District staff on a tour of the facility which lasted approximately 30-40 minutes (TR 1:177, 258; 2:94; 7:48, 104; Ex. R-40 at 368). During the tour, District staff did have an opportunity to observe Student working with a teacher (TR 2:45, 94; 7:48). At hearing, District staff testified that the strategies that Moog teacher used were similar to those used by Poplar Bluff staff (TR 1:177; 2:45, 94-95; 7:48, 104-05). Dr. Jackson testified that, based on that observation, she had no concerns about the District's ability to provide Student with a FAPE (TR 1:177-78).

66. Student's cochlear implant, although surgically implanted, had not been initially activated or turned on at the time of this meeting (R-40 at 369; TR 1:260-64). The team

discussed the possible need to revise Student's audition goals after her initial mapping but agreed that it was premature to revise the IEP until that occurred (R-40 at 369, 373). Dr. Jackson informed the team that it would reconvene after the initial mapping and also stated that the District would need to rely on Moog to help develop a new present level of performance since Student was not attending school in the District (R-40 at 373).

67. On January 31, 2005, the District sent Petitioner a meeting notification for an additional IEP meeting for February 22, 2005, to review and revise Student's IEP and to consider a change of placement (R-41 at 375). On February 4, 2005, Petitioner informed the District by letter that he had a conflict for that date (R-41 at 376, 378). On February 23, 2005, the District sent him a written meeting notification for an IEP meeting to be held on March 2, 2005 (R-41 at 381).

68. On February 28, 2005, Petitioner telephoned Dr. Jackson to discuss what Angela Turner's role would be in Student's educational program (R-42 at 382). Dr. Jackson testified that she explained that it was an IEP team decision, but she anticipated that Ms. Turner would work with Student on audition and in conjunction with Student's regular education and special education teachers as well as the speech-language pathologist (R-42 at 382; TR 1:265; 7:150).

69. In January 2005, Angela Turner began working for the District as a Missouri state certified teacher for the deaf (TR 1:172-73). Since that time, Ms. Turner has worked with each of the District's hearing impaired/deaf students in some capacity and according to Dr. Jackson, the parents and students have been pleased with her performance (TR 1:172-73). Angela Turner is hearing impaired with profound hearing loss but has a hearing aid for one ear, and is oral, relying on lip reading and the hearing aid (TR 3:205-06). Dr. Jackson has observed Ms. Turner in the classroom, personally finds her speech intelligible, and has never received a complaint that she is unintelligible (TR 1:173-75). At hearing, Dr. Jackson testified that it was never the District's intent to have Ms. Turner be the sole implementor of Student's IEP goals (TR 7:203). Rather, Ms. Turner's primary responsibility would have been to work with Student on academics and to co-implement her speech, language and audition goals (TR 1:246-47; 7:199, 200, 202-03). Dr. Jackson testified that she had no concerns about Ms. Turner working with Student and that the benefits of Ms. Turner working with Student outweighed any limitations, if any, which might exist (TR 7:202, 223).

70. On March 2, 2005, Student's IEP team again convened. The following individuals participated: Jean Moog, Christine Gustus, Mary Shortal, Becky Durrell (Moog teacher), Beth Holstad, Barbara Brown ("Individual to Interpret Instruction Implication of Evaluation Results"), Marilyn Johnson (interpreter for Angela Turner), Angela Turner, Christy Smith, Sharon Burkey, Stephanie Misner (District SLP), Charlotte Rowland (District special education teacher), Janice Duckett (District regular education teacher), Dr. Jackson, Petitioner and Teri Goldman (R-44 at 387; TR 2:223; 3:12; 6:193). Petitioner and the Moog staff participated by telephone (TR 5:55-56). When the team first convened, none of Student's Moog classroom teachers were present and the District requested their participation (R-44 at 387). Moog agreed to bring some of those teachers to the meeting (*Id.*). No speech language pathologist was present as an SLP was not working with Student at the time (R-44 at 387). As the group began to develop the present level of educational performance (PLEP) section of the

IEP, according to the meeting notes, Dr. Jackson stated that the school team would have to rely on Moog staff since the District had not had an opportunity to work with Student (R-44 at 393). The meeting notes reflect that data was requested from Moog on PLEP but that Moog staff did not believe the District would understand their data (*Id.*). Dr. Jackson indicated the IEP could be completed on this date (R-44 at 393-95) except for perhaps the articulation goal because speech samples would need to be obtained from Moog (R-44 at 397).<sup>11</sup> The meeting notes do not indicate whether there was consensus reached with respect to Student's IEP goals and objectives; but there was clearly no consensus on placement (R-44 at 396-99; TR 5:57).

71. At the meeting, the team updated and developed a new IEP for Student. The IEP states annual goals and objectives in the following areas: speech articulation, expressive language, academics, math, reading, letters, and auditory training (R-45). The IEP proposes services of 30 minutes per day of special education in math and reading in the special education or regular education classroom and an additional zero to sixty minutes per day of specialized instruction in math and reading in the regular education classroom (R-45; TR 1:148-55, 267). Dr. Jackson testified that a range of minutes was an appropriate description of services under state and federal law (TR 1:267). The range allowed for the provision of services in the least restrictive environment – if Student needed more special education services, those could be provided or if she was capable she could access the regular classroom without the additional specialized instruction (TR 1:152). The District had not yet worked with the Student as hearing impaired and did not know what would result in the least restrictive environment (*Id.*). Dr. Jackson further testified that the IEP was only required to identify where the services would be provided and not by whom (TR 1:154). These services could have been provided by the deaf education teacher, Angela Turner on a “push-in,” basis, meaning special education provided in the regular classroom, or by the regular education teacher who was not deaf certified (*Id.*). The IEP further proposed 60 minutes per day of speech/language and audition therapy in a “pull-out program,” meaning the Student receives services in a therapy room in a 1:1 teacher to student ratio or small group (R-45 at 417). The IEP includes references to supplementary aides and services, including an auditory trainer or FM system, and a 1:1 facilitator (aide) who would accompany Student in all settings (*Id.*). The IEP proposes three daily cochlear implant checks by staff and four District funded audiological checks per year,<sup>12</sup> addresses transportation as a related service, proposes extended school year services and provides for physical education in a mainstreamed environment (R-45 at 418, 421). Environmental issues and supports for school personnel were specified on Alternate Form I (R-45 at 424B).<sup>13</sup> A continuum of placements was recited as being considered, including private placement (R-45 at 420). The placement proposed was for full-day kindergarten with Student spending 35% of the school day in special education and 65% of the day in regular education with supports, accommodations and modifications (R-45

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<sup>11</sup> Although an IEP was proposed on this date, Dr. Jackson subsequently asked for information from Moog regarding this data by phone message to Mary Shortal on April 1, 2005 (R-46 at 426; TR 1:270). Ms. Shortal wrote back on April 6, 2005, that she would be unable to forward the information at Petitioner's request (R-46 at 428).

<sup>12</sup> These checks don't include mapping of the device. This is not a required related service that the District is required to provide at District's expense, according to Dr. Jackson (TR 1:227).

<sup>13</sup> This form contains a checklist for accommodations and modifications for the student to be used in special and general education classes. Student's checklist indicated environmental accommodations such as tennis balls on chairs and table legs in non-carpeted areas to reduce noise. It provided for the auditory trainer and required daily consultation by the hearing impaired teachers with Student's teachers. It also provided for an audiologist to assess the room condition (R-45 at 424B).

at 419).<sup>14</sup> District witnesses who testified who were involved in this IEP process, testified that they believed the implementation of the IEP would provide FAPE to Student (TR 1:266-67 - Jackson; TR 2:71-72 – Bradley, although she did not attend the IEP meeting). The meeting notes do not reflect that Petitioner requested any additional services from the District (R-44). At the end of the IEP meeting, Petitioner rejected the placement and IEP (R-44 at 399).

72. At hearing, Petitioner testified that he believed that the District never really considered placing Student at Moog and he disagreed with the proposed placement (TR 5:56). He also testified that: “They [Moog and the District] both had different philosophies about how to teach an oral deaf child” (TR 5:56).

73. The District provided the parents with a written notice of action again rejecting the requested Moog placement, stating that the District believed the placement was not in the least restrictive environment and that Student would benefit from the provision of educational services with the same age peers as well as nondisabled peers (R-47).

74. Both Petitioners and Respondent called Dr. Amy Jackson to testify. Dr. Jackson began attending Student’s IEP meetings as the local educational agency representative after she received Petitioner’s telephone call on August 30, 2004 requesting the Moog placement (TR 1:26-27, 178). Dr. Jackson testified that the District did not refuse the Moog placement because of funding but because it was not the least restrictive environment for Student (TR 1:178-79, 202-03). At hearing, Dr. Jackson testified that she had determined that there was no significant difference in the funding of Student’s proposed program at Poplar Bluff with one at Moog (TR 1:179). Dr. Jackson was present when Dr. Nevins testified for Petitioners. In her opinion, the District has gone above and beyond what Dr. Nevins as appropriate for a student in the public school setting (TR 7:205-06). Dr. Jackson also testified that the District was “most definitely” willing to consider contracting with Moog for some consulting services upon Student’s return to the District (TR 1:264).

75. Petitioners called Jeanine Bradley, the SLP for the early childhood program to testify (TR 2:5). Ms. Bradley testified that, based on her training as a speech-language pathologist, she was qualified to work with hearing impaired children, including children with cochlear implants (TR 1:44, 105-06). In her opinion, Student needs to have a speech-language pathologist working directly with her (TR 2:106). Ms. Bradley believes Student’s disabilities can impact her academically and that is why it is necessary for her IEPs to address academics as well as speech and language (TR 2:263). In Ms. Bradley’s opinion, the IEPs developed for Student after her hearing impairment were appropriate based on information that team had at the time and proposed a placement in the least restrictive environment (TR 2:71-72). Ms. Bradley does not believe that Moog is an appropriate placement because no children without hearing deficits attend there (TR 2:72). In her opinion, the Moog IEPs are not sufficiently individualized for Student, but use checklist information that is used for all Moog students (*Id.*).

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<sup>14</sup> The March 2005 IEP was not intended to be used during the 2005-06 school year but was intended only to be implemented through the end of kindergarten (TR 1:269). The District conducts a transition IEP meeting for students going on to first grade because the building in which the student will attend changes as to the service providers (TR 1:269-70).



76. Petitioners called Christine Gustus, the principal at Moog, to testify. She has a bachelor's and a master's degree in speech and hearing and is a certified speech-language pathologist, certified by the State of Missouri to teach hearing impaired children (TR 2:175). Ms. Gustus' experience has been in teaching oral deaf children to talk and she has never worked as an educator in the public school system or observed in the Poplar Bluff School System (TR 2:253). She has not worked directly as a classroom teacher with students with cochlear implants (TR 2:257).

77. Ms. Gustus attended the District's IEP meetings held for Student (TR 2:200-01). In Ms. Gustus' opinion, it is not beneficial at this time for Student to be in a classroom environment with normal hearing peers (TR 2:200, 249). According to Ms. Gustus, Student does not hear well enough to absorb or understand the language that such children produce (TR 2:200, 249). In Ms. Gustus' opinion, Student's language skills would have to be in the normal range before she could be placed in regular education (TR 2:249; 3:24-25). Ms. Gustus believes that Student needs to remain at the Moog Center at least through the completion of the 2005-06 school year (TR 2:250-51). Ms. Gustus did testify that Student could receive "some benefit in another program" but that Student "could not be in the mainstream 65 percent of the time and catch up with her normal hearing age-mates" (TR 2:345). Ms. Gustus acknowledged that different approaches exist with regard to teaching deaf children how to speak (TR 2:263). She also testified that the Poplar Bluff and Moog staffs were speaking different language with respect to teaching a deaf child to talk, that Moog has "a methodology of teaching deaf children to talk that's been very, very successful and we have goals and objectives that we set up that were set up in the initial IEP from our – from our end. And they [the District] had different goals and objectives, and as we tried to describe our goals and objectives, it just seemed like they weren't listening to our opinion on how to teach deaf children to talk" (TR 2:226). Ms. Gustus testified that hearing impaired children acquire language differently than normal children, who are able to absorb language naturally by talking, compared to hearing impaired children who need direct instruction to learn to speak (TR 2:183).

78. Ms. Gustus testified about the Moog program. For the 3-9 years of age program, all classrooms have teachers of the deaf (TR 2:183). Most Moog teachers have a master's degree in deaf education, are all certified by the State of Missouri in deaf education, all have been trained in oral deaf education and all have experience with cochlear implants (TR 2:185-86). Each teacher has about 4 children he or she is responsible for but only 2 to 3 are instructed at a time (TR 2:184). Children are grouped by ability and spend approximately 30 minutes in any particular class which is based on the attention span of the children (TR 2:184-85). Language instruction is integrated into every subject matter (TR 2:185). Children of Student's age would all have courses in art, music, library, reading, conversational language, computers, science, social studies, math, critical thinking, speech and auditory training (TR 189). Deaf education teachers are also present during recess and lunch to assist with conversational skills (TR 193-94). Moog's physical environment is designed to control noise and static electricity issues (TR 2:191-93). Moog IEPs are individualized for each child and has their own TASL (Teacher Assessment of Spoken Language) with goals and objectives included (TR 2:227).

79. Ms. Gustus testified that Student does not need a SLP for therapy because speech and language at Moog is taught all day long and any such instruction can be done by the Moog certified deaf educators (TR 2:268, 270-01). According to Ms. Gustus, Student was evaluated for SLP services by the Moog SLP who determined those services were only required on a consult basis; that Student's apraxia was in a "mild range." (TR 2:271, 275).

80. Petitioners called Beth Holstad to testify. Ms. Holstad is employed by the Moog Center as a pediatric audiologist and has been so employed for ten years (TR 3:98). Ms. Holstad has her certificate of clinic competency ("C's") in audiology and is medically board certified in audiology with a specialty in cochlear implants (TR 3:99, 140). Before her employment at Moog, Ms. Holstad was employed by Central Institute for the Deaf (TR 3:99-100). Ms. Holstad is not a certified deaf educator (TR 3:140). Ms. Holstad testified that the Moog Center includes audiological facilities, including two cochlear implant programming rooms, which allow Moog staff to immediately check to see if a device has a problem (TR 3:102-03). Some of the trouble shooting of a cochlear implant can be handled by a non-audiologist and children with implants can receive their mapping at places other than Moog (TR 3:143, 145).

81. Petitioners called Becky Durrell, a classroom teacher at Moog for 8 years since receipt of her bachelor's degree (TR 4:6, 46). She has a bachelor's degree and a master's degree in reading and is certified in deaf education and regular elementary education and was trained to teach the oral approach to hearing impaired children (TR 4:6, 50). Ms. Durrell testified that the oral approach can be used in a variety of settings, including public schools (TR 4:50). Ms. Durrell has never taught in a regular education classroom (TR 4:54). Although Ms. Durrell had only some limited experience working with children with cochlear implants at the time of her initial employment and was still learning, she believed that she was qualified to teach children with cochlear implants in that first position (TR 4:49).

82. Ms. Durrell was Student's kindergarten classroom teacher for the 2004-05 school year, teaching the subjects of language, speech, auditory training, reading and math (TR 4:8, 11). When Student began in Ms. Durrell's class, according to Ms. Durrell she had hearing aids in both ears (TR 4:9). Her language was delayed, she was behind her peers, she did not use complete sentences, she used some word combinations and asked questions incompletely, omitted words in her utterances and her word order was confused (*Id.*).

83. Ms. Durrell testified that Student's initial IEP at Moog was prepared on October 14, 2004 (TR 4:15). She testified that children who are postlingually deaf tend to progress differently than children who are prelingually deaf because they had hearing and had begun to develop language prior to the onset of hearing loss (TR 4:90). She explained the oral program as follows (TR 4:10):

Our method of teaching is that we're an oral program, so we teach spoken language and we teach spoken language [sic] with techniques such as modeling and imitation, where we model correctly and encourage the student to imitate it back to get practice with using correct spoken language. And we use a lot of repetition where the student practices a language repeatedly throughout the day.

84. The Moog school uses a curriculum known as TASL (Teacher Assessment of Spoken Language which provides assessment forms for school use (TR 4:10; P-56 at 529-39). The assessment forms are used to analyze what language the Student was and was not using spontaneously (TR 4:11). Using the assessment, Ms. Durrell chooses areas of need to work on as her “targets” for each week (TR 4:11-12). Notes are taken daily about the Student’s progress in target areas (*Id.*). Student received 30 minutes of speech (including auditory training), 30 minutes of reading, 25 minutes of syntax, 30 minutes of conversational language and 25 minutes of language experience every day, but Ms. Durrell notes that Student is “receiving speech throughout the day on top of this” (TR 4:85-6). The same schedule is generally followed for primary students (TR 4:86). Math was taught for 25 minutes daily in the classroom with four other students (TR 4:23) while two other periods were 1:1 and one other period was a 1:2 teacher student ratio (TR 4:23, 43-4). Science and social studies are taught in the learning center (TR 4:93).

85. Ms. Durrell testified that Student made progress in language and speech during the year and after the activation of the cochlear implant made progress in audition (TR 4:28, 30, 42). Ms. Durrell stated that in her opinion, the Student’s progress was specifically related to the teaching at Moog, “because she was receiving what she needed to acquire spoken language; the repetition, the practice, the structured teaching in a small group setting” (TR 4:42). Ms. Durrell further defined structured teaching as “a very intensive way of teaching specific skills in a variety of ways. So a specific skill or target or structure is taught repetitively and also using a variety of – in different activities, it’s not that it’s learned in one way, but that it’s demonstrated that it’s carried over into other activities” (TR 4:94).

86. Ms. Durrell testified that Student’s language remained delayed and, in Ms. Durrell’s opinion, Student was not ready for a regular education classroom because she would: “still have a difficult time following a classroom discussion and understanding and comprehending what was going on in the classroom and her language just isn’t – I don’t feel it’s developed enough for her to be successful in that type of environment” (TR 4:42). Even with accommodations such as instruction in pre-vocabulary skills of a lesson in a small or one on one setting and an acoustically prepared environment, Ms. Durrell testified that she did not believe Student had the language skills to be in the regular classroom for 65% of the time (TR 4:81) and that Student needed to be in a structured teaching environment for the majority of the day (TR 4:84). Ms. Durrell did not believe a one-on-one aide would be effective for Student as if the aide was just repeating to Student what was just said, the aide would miss what was being said next (TR 4:43). Further, Ms. Durrell stated it would set Student apart and that “it doesn’t seem the most appropriate if she would require somebody to be explaining that much to her right now” (*Id.*). She testified that Student would need preferential seating, an FM system and some individualized or small group settings where vocabulary could be pre-taught (TR 4:44, 80). She also testified that there was benefit to both hearing impaired children and nondisabled children to being around each other (TR 4:74-5). Ms. Durrell testified that the primary goal of Moog is to get students back into the mainstream education environment as quickly as possible (TR 4:91).

87. Theresa O'Donoghue testified for Petitioner. She has been a certified deaf education teacher at Moog for 10 years and has 23 years of experience teaching oral deaf children, currently teaching children in the 3-9 year of age program (TR 4:100-04). She was Student's beginning reading and conversational language teacher for the 2004-05 school year and taught reading and social skills to Student during the 2005-06 school year (TR 4:110-11). Ms. O'Donoghue has never taught in a public school environment (TR 4:130, 136). Ms. O'Donoghue's undergraduate training did not address how to teach children with cochlear implants but on how to teach deaf children to talk (TR 4:126). Ms. O'Donoghue testified that she believed that she was qualified to teach children with cochlear implants based upon her undergraduate training (TR 4:126-27). Ms. O'Donoghue testified that she did not know if the type of collaboration that she described existed at Moog between teachers at Moog occurred in public schools for students with IEPs (TR 4:133). She further testified that she did not know if the strategies that she described using at Moog could be used in a public school environment (TR 4:145). She testified that she did not know whether there would be benefit to Student in spending time with her nondisabled peers (TR 4:148).

88. Ms. O'Donoghue testified that she did not know how Student's receptive language skills compared to those of her nondisabled peers when she first enrolled at Moog (TR 4:147). According to Ms. O'Donoghue, Student made progress in those areas (TR 4:118). Given Student's progress to date, it was Ms. O'Donoghue's opinion that Student would learn to talk, to communicate with others using spoken words and eventually transition back into the mainstream educational setting (TR 4:123-4). However, Ms. O'Donoghue did not believe that Student was ready for a mainstream setting for 65% of the school day at this time "because "she doesn't have the language to communicate or to understand what is being said to her at this point" (TR 4:124). Ms. O'Donoghue didn't believe Student had this capacity on November 22, 2004 or March 2, 2005 either (*Id.*). Ms. O'Donoghue did not believe a one-on-one aide would help Student because "as the aide felt the need to explain, which would be often, to explain the language that was being presented or the vocabulary or what the other children were saying or what the teacher was saying, that would take [Student's] attention away from the teacher and the other events in the classroom and focus just on the aide. Then as that is going on, she's missing more. So the aide has to explain what she just missed, and it would continue on and on as if a snowball effect" (TR 4:125).

89. Jean Moog testified for Petitioners. She was offered as an expert in the field of deaf education with no objection (TR 4:156). Ms. Moog is the Director of Moog and oversees all of the educational and other Moog activities (TR 4:157). She has an undergraduate degree in philosophy and a master's degree in speech and hearing and is certified in deaf education (TR 4:157, 191). Ms. Moog was employed at Central Institute for the Deaf (CID) from 1966 until 1996 when she founded the Moog School (TR 4:157). Ms. Moog has never been a classroom teacher at Moog and has not been a classroom teacher since 1978 (TR 4:191). Ms. Moog has no public school experience (TR 4:190). Ms. Moog became aware of cochlear implants in 1983 when she was asked by the U.S. Food and Drug Administration to evaluate that product and there was a child at CID using that product (TR 4:160-1).

90. At hearing, Ms. Moog testified that hearing impaired children do not acquire language the same as normal children do (TR 4:161). According to Ms. Moog, normal hearing

children acquire language from birth by hearing it and develop it by hearing others around them talk while in contrast, deaf children typically need direct instruction to learn how to talk (TR 4:161). She testified that birth to 3 is the best age to teach children how to talk, then up to age 6 (TR 4:162). Between the ages of 6 and 12, the results are questionable and after age 12, even normal hearing people will have an accent in any new language they are trying to learn (TR 4:162). According to Ms. Moog's testimony, it would be unusual to have a child with no exposure to spoken language by age 6 to become completely fluent in spoken language (*Id.*). Ms. Moog testified that the average deaf adult reads somewhere between the 3<sup>rd</sup> and 5<sup>th</sup> grade level because deaf people have not acquired good enough language skills to be able to read competently at higher levels (TR 4:163). According to Ms. Moog, if you lack the English language, then you cannot understand the reading as the syntax becomes more complex (*Id.*).

91. Ms. Moog testified that the focus at Moog is on teaching children how to use spoken language (TR 4:191). Moog also produces and makes commercially available TASL, a tool known as SPICE (Speech Perception Instructional Curriculum and Evaluation) (acronym defined by Christine Gustus, TR 2:176), and Jump Start as evaluation and curriculum tools (TR 3:192, 204). She stated that she was unaware of any studies that have looked at the validity of those tools as criterion referenced instruments (TR 4:192). Ms. Moog testified that there are approximate 40 private oral schools such as Moog, each of which averages a student enrollment of about 30 and that a much larger percentage of students with hearing impairments attend the public schools (TR 4:205-06). Ms. Moog acknowledged that there are probably people in the deaf education field who criticize Moog but she did not further elucidate her understanding of the nature of the criticism (TR 4:193). She stated that there is no study that compares the progress of children in Moog type programs and public school settings but that Moog is currently collecting data for such a study (TR 4:199).

92. Ms. Moog knows Student but has not worked with her on a day-to-day basis (TR 4:171). Ms. Moog attended three of Student's IEP meeting at the request of the Petitioner (TR 4:207-08). She testified that, at the November 2004 IEP meeting she may have referenced the Leiter IQ test as a test that measures only performance and stated that the test is nonverbal (TR 4:210-11). She testified that she believed there were research students that showed that performance IQ is a valid measure of potential in hearing impaired children but didn't offer any specifics (TR 4:210).

93. Ms. Moog testified that if Angela Turner was able to listen well enough through lip reading and hearing, to hear the language spoken by Student in order to help Student improve during reading and math activities, that she would not be concerned about Ms. Turner being the service provider (TR 4:184). However, Ms. Moog testified that she was concerned about Ms. Turner teaching spoken language skills and correcting speech (*Id.*). Ms. Moog's stated that a speech language pathologist could learn how to listen to Student and model speech and properly correct Student's speech (TR 4:207).

94. Petitioner also testified and acknowledged believing that he had been advised of and had attended all of Student's IEP meetings and was allowed to ask questions at the meetings (TR 5:86-7, 90). He also received copies of Student's IEPs and evaluation reports (TR 5:86). Petitioner agreed that Student's educational needs changed during the summer of 2004 and that it

was logical for the District to reevaluate her before determining how those needs had changed (TR 5:88). He also agreed that the educational implications of hearing loss are not the same for all hearing impaired children (TR 5:89). He acknowledged that the IEPs developed after Student suffered a hearing loss included oral communication as her primary mode of communication and that the District never advised that it was going to offer a program that focused on sign language communication (TR 5:95-6). He further acknowledged that the purpose of the IEP team is not necessarily to agree to what the parent or Moog staff requests and that there is room for professional disagreement about what may be appropriate for Student (TR 5:100). He testified that he did not believe the District ever really considered placing Student at Moog and that the District and Moog had different teaching philosophies (TR 5:56). He believed the District was not very specific with its proposed program and was vague (TR 5:57). He testified that he didn't get enough information to determine what the District's program was and he thought the District was being evasive (*Id.*).

95. In Petitioner's opinion, Student has made progress since she began attending Moog (TR 5:60). He also testified that he understood that Student would have teachers other than Ms. Turner if she returned to Poplar Bluff and that she would have nondisabled peers who could serve as language role models (TR 5:109). His goal is to have Student leave Moog by May 2007 but in his opinion, she is not currently ready for a mainstream setting (TR 5:121).

96. The parties stipulated to witness Dr. Mary Ellen Nevins as an expert in deaf education (TR 6:15). Dr. Nevins has a bachelor's degree in speech correction, and a doctorate with a concentration in the education of hearing impaired children (TR 6:8, 10). Dr. Nevins previously taught at Central Institute for the Deaf in St. Louis and Jean Moog was one of her supervisors there (TR 6:9, 56). Dr. Nevins is certified in Missouri as a teacher but has never taught in a public school setting (TR 6:58). Dr. Nevins has focused the large majority of her professional writings on the needs of children with cochlear implants (TR 6:13). Dr. Nevins was charging an honorarium of \$1,000 per day for her time, her review of records for approximately 6 hours and her observation of Student at Moog in mid-January 2006 (TR 6:34, 56-57). Dr. Nevins is a "professional development specialist" and has a private practice in which she consults with schools, hospitals, and others who work with children with cochlear implants (TR 6:7). In that capacity, she trains people to work with children with hearing impairments in educational environments, including the public schools (TR 6:58-9). Dr. Nevins agreed that the vast majority of students with hearing impairments are educated in public schools (TR 6:60). Although Dr. Nevins testified that she is familiar with IDEA, she stated that the professional development that she provides is not intended to educate persons on how to be compliant with IDEA requirements (TR 6:62).

97. Dr. Nevins is the co-author of a book entitled "Children with Cochlear Implants in Educational Settings" (TR 6:85). She testified that the fundamental principles articulated in that publication remain sound, one of which being that cochlear implant technology supports the trend toward greater inclusion of disabled children with hearing impairments (*Id.*). The book cites studies dating back to 1980 and 1983 stating that deaf children in mainstream educational settings attain higher levels on standardized tests than non-mainstreamed children; however, this was a comparison of students who had already attained the language skills necessary to get access to the mainstream curriculum compared to students remaining in schools for the deaf who

did not (TR 4:120). Better speech intelligibility is another advantage of mainstream placement, but this would not be of benefit for Student according to Dr. Nevins, as Student needs an environment that will help her develop skills she will need to be successful in the mainstream (TR 4:126). “Mainstreaming”, as defined by Dr. Nevins, is a setting where a student has sufficient skills to warrant an independent placement with minimal support services and no instruction by a certified teacher of the deaf, with the exception of some collaborative consultation, as contrasted to what she calls “inclusion” which is a setting where there is often a side-by-side educational team with a teacher of the deaf and regular education teacher working together with a group of children in a regular classroom environment (TR 6:61-2).

98. Dr. Nevins testified about how there are a number of avenues by which hearing impaired children acquire language (TR 6:17). Children with hearing impairments who have hearing parents and who are trying to develop spoken language need auditory access (*Id.*). According to Dr. Nevins, “the bottom line is if you want to learn spoken language, the most direct route is through audition” (*Id.*). Hearing aids provide audition and do help children with mild to moderate level hearing losses develop language in a more natural manner, that being through absorption, by producing language and listening to it and by encouragement by the parent or care giver to produce more (TR 6:18, 15). The results of hearing aids on profoundly deaf children was “always somewhat disappointing” according to Dr. Nevins and did not provide the same level of audition provided to the category of mild to moderately deaf children (TR 6:18). Dr. Nevins testified that a child with a cochlear implant has even better auditory access so that even a profoundly deaf child now has a better opportunity to learn language in a more natural fashion (TR 2:18-19). But Dr. Nevins testified that “it’s not simply a matter of putting the cochlear implant on and forgetting about it and letting the child go and – and accrue language. There needs be some specialized attention to the systematic development of language, but the task is made much, much easier by the auditory access and the superiority of that access now provided by the cochlear implant” (TR 6:19). Where children have a language learning problem before the onset of hearing loss, the situation becomes more complex; auditory access alone does not override an underlying language learning problem (TR 6:20-1). Dr. Nevins further testified that there is a window of language learning opportunities, with birth to age 3 or 4 as the prime language learning time (TR 6:28).

99. Dr. Nevins testified as to the challenges of the mainstream environment from an auditory perspective, most notably that classrooms are noisy places (TR 6:30). Children with cochlear implants require greater auditory access, such as personal FM devices that bring the teachers’ voices directly to the child (*Id.*). The greatest challenge according to Dr. Nevins, is the academic challenge that remains (*Id.*) The child needs enough language to support him at the time of mainstreaming but needs to continue learning the language (TR 6:31). Dr. Nevins testified that speech is the outward representation of language so there needs to be receptive understanding and spoken language output that is clear and intelligible and able to be understood (TR 6:32). Dr. Nevins stated that in her opinion, for the development of speech production, the child is best served by a teacher who has auditory access and standard speech production skills, standard rhythm and melody and who can monitor the child’s production of speech as well (TR 6:33-34).

100. Dr. Nevins testified that as to her understanding of the Moog program as teaching children spoken language (TR 6:74). She testified that it was important for Student to have access to the general curriculum but didn't know how the Moog program conformed to the Missouri state curriculum (TR 6:77). Dr. Nevins testified that she was not aware of any studies that compared the progress of children in small self-contained oral education classrooms with the larger public school programming or studies that track students in private Moog-type placements for their success in the public school setting (TR 6:78).

101. Dr. Nevins testified Student is a deaf, rather than a hearing impaired, student because she has an unaided hearing loss of at least 90 decibels and that she considered Student to be prelingually<sup>15</sup> deaf because while she was deafened after first being able to hear, she did not have language commensurate with her age at the time of the identified hearing loss (TR 6:65, 67). While the shorter the period of deafness the better, Student's language delays do not promise her the same outcomes that the general population of hearing aid users would expect from a short period of postlingual deafness followed by a cochlear implant (TR 6:117-18). Dr. Nevins disagreed with those standardized test results that showed when Student was 2 years of age that her receptive language skills were within normal limits, but conceded that the test scores were within that range (TR 6:67-71). She further stated that a student's receptive language skills have educational implications because "receptive language skills are the cornerstone of subsequent learning" and have a direct correlation with what the child can hear and understand in the classroom (TR 6:71-72). Student's expressive output was significantly delayed and the combination of the two, receptive and expressive, caused Dr. Nevins to consider Student to have significantly delayed language at the time of deafness (TR 6:117-18). The level of a student's auditory access and the level of receptive language are both factors "within a constellation of factors" for consideration in deciding a student's placement (TR 6:73).

102. Dr. Nevins testified that an appropriate IEP for Student should address her auditory skills, speech intelligibility, and expressive and receptive language and academic areas (TR 6:83-4). She also testified that it is important not to have a "one-size-fits-all" IEP for a hearing impaired child and she stands by the statement in the book that she co-authored that school staff needs to be able to provide flexible programming that matches the child's learning styles and capabilities (TR 6:98-99). She further testified that she envisions speech-language pathologists as playing a role in a hearing impaired child's education by providing speech, language and audition therapy (TR 6:101-03).

103. In Dr. Nevins' opinion, the District's proposed placement in the November 2004 or March 2005 IEP was not appropriate because Student would not have the skills to support continued academic progress in a mainstreamed environment and Student would not have the opportunity to improve her spoken language skills in that environment (TR 6:49-52). She also had concerns with the one-to-one aide proposal because "repetition of what the teacher says is not going to develop language" (TR 6:51). She had concerns about some of the background knowledge that the personnel in the District had with meeting Student's specific needs (TR 6:52). Dr. Nevins testified that Student does not have the linguistic skills to support academic

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<sup>15</sup> At hearing, Chris Gustus testified that a prelingually deaf child is one who experiences a hearing loss prior to the development of language and a postlingually deaf child is one had had developed some language prior to the hearing loss (TR 2:260-61).



learning (TR 6:49). The student has to be able to use language to learn language (TR 6:48). The student has to have the very minimum average abilities when compared to hearing peers to succeed in the mainstream setting (*Id.*). In her observation of Student at Moog, Dr. Nevins testified that when Student did well in structured settings and had more difficulty in the unstructured setting (TR 6:41-2). Student did not appear to have the language to understand content in real classroom settings (TR 6:42). Dr. Nevins believed that Student had some language learning issues that would continue to present a problem “when academic content is overlaid on that” (TR 6:43). In Dr. Nevins’ opinion, Student has made progress at Moog, as a direct result of the teaching strategies, which is a “seamless” approach of incorporating language with instruction in speech, language, audition, vocabulary and more (TR 6:44-5). Dr. Nevins testified that she did not believe Student would progress as well in an environment that does not provide instruction in the context of “authentic communication” as opposed to 30 minutes of speech, 30 minutes of audition and 30 minutes of language and that Student needs a program that continues to focus on language development while at the same time paying attention to the development of content (TR 6:47).

104. Dr. Nevins acknowledged during her testimony that she did not know what type of skills, training and experience District staff had with respect to cochlear implants and working with children with hearing loss (TR 6:89-90). She also stated that many children with hearing impairments and cochlear implants can be successfully served in public schools and one of the purposes of her book was to make recommendations with respect to how that can be done (TR 6:102-03). One of those recommendations is that all care providers collaborate on programming (TR 6:117).

105. Respondents called Berla Bieller, the District’s psychological examiner, to testify. In addition to her testimony cited above, Ms. Bieller testified that in her opinion, an IEP that focused primarily on teaching spoken language to Student that it would not have provided her with FAPE (TR 6:197). Ms. Bieller also testified that in her opinion, a child does not require normal or average language skills commensurate with their nondisabled peers to be successful in a regular education environment (TR 6:201-02). Ms. Bieller agreed with the placements proposed in the November 2004 District IEP and, in her opinion, Moog was not Student’s least restrictive environment (TR 6:199-200, 257-58). Ms. Bieller did not participate in the March 2005 IEP meeting (TR 6:200).

106. Respondents called Christy Smith, District early childhood special education teacher, to testify. In addition to the testimony cited above, Ms. Smith testified that she felt free to express her opinion about what was an appropriate placement for Student at IEP meetings (TR 7:85-6). Ms. Smith is familiar with the District’s kindergarten curriculum and believes that Student could have received FAPE in the kindergarten classroom (TR 7:51-2). In that environment, she would have access to the general curriculum and trained professionals and be with nondisabled peers for language and speech (TR 7:52). She agreed with the placement proposed in the November 2004 IEP (TR 7:48).

107. Angela Turner was called by Petitioners to testify (TR 3:177).<sup>16</sup> Ms. Turner became employed by the Poplar Bluff School District in January 2005 as a teacher for the hearing impaired (TR 3:177-78, 203). She has a bachelor's and a master's degree in communication science and disorders with an emphasis in deaf education and is certified by the State in hearing impairments/deaf education (TR 3:177, 203). During her educational program, Ms. Turner took courses and gained experience working with children with cochlear implants (TR 3:181, 204). Since receiving her degrees, she has taken additional courses on cochlear implants, teaching children with cochlear implants and teaching hearing impaired children how to speak (TR 3:204-05). In her opinion, she is qualified to serve as one of Student's teachers should she return to the District (TR 3:205, 216). At the time of hearing, Ms. Turner wore a hearing aid, and expressed interest in obtaining a cochlear implant (TR 3:187). Ms. Turner's mother recently received a cochlear implant and Ms. Turner works with her on discriminating between vowels and consonants (TR 3:212).

108. Ms. Turner did not agree that hearing impaired children acquire language differently from normal children (TR 3:189). She believes that with family support, early amplification and the right interventions, students can develop language that is close to their hearing peers (TR 3:209-10). Ms. Turner disagrees with the Moog philosophy that states that hearing impaired children should be placed with hearing children only when they are caught up with those peers (TR 3:210). Ms. Turner was not sure she understood the Moog program fully, but stated that she believed it was to build audition skills in language or speech as a primary focus of the program at the expense of other academic areas (TR 3:221). Ms. Turner testified, "that's okay in the early years, but I think as the child gets older there needs to be – it needs to be in proportion with the academic studies as well" (*Id.*).

109. At the time of hearing, Ms. Turner worked with 7 of the District's hearing impaired/deaf students; 6 of whom were oral and one used sign language communication (TR 3:180). Ms. Turner works 1:1 with six of those students on a daily basis (TR 3:180). She provides some of the services in a regular education setting by "pushing-in" to that setting and also provides some services by "pulling-out" the student from the regular education setting (TR 3:198). She collaborates with the students' regular education teachers to supplement the academic instruction that is presented in the regular classroom (TR 3:218). She lets the SLP address articulation (*Id.*). Ms. Turner testified that in her opinion she served as a role model to hearing impaired students and she was not aware of any parental complaints (TR 3:211). There were a couple of occasions when Ms. Turner requested help from a hearing teacher when she could not hear a student or vice versa (*Id.*)

110. Ms. Turner has never met Student and has never had the opportunity to work with her or to implement one of Student's IEPs (TR 3:192, 213-14). Ms. Turner attended the January and March 2005 IEP meetings for Student (TR 3:185,189). She did not have an interpreter present at the January IEP meeting and believed she was able to follow the conversation (TR 3:213). She did request an interpreter at the March IEP meeting because Petitioner and the Moog staff participated by telephone (TR 3:190). If Student returned to the District, Ms. Turner anticipates working with her on audition, math and reading but not speech (TR 3:193-96, 217).

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<sup>16</sup> Because she knew she was going to be testifying under oath and wanted to be sure she understood the questions being asked, Ms. Turner requested a captionist or real time reporting during her testimony (TR 3:190, 213-16).

111. Susan Jenkins also testified on behalf of the District. Ms. Jenkins is employed as the Director of Special Services for the Salem R-80 School District in Salem, Missouri, a kindergarten through 12<sup>th</sup> grade public school district with approximately 1,500 total students of whom approximately 198 have IEPs. (TR 7:5). Ms. Jenkins testified that the Salem District has a developmental preschool and contracts for a speech-language pathologist to work there three days per week (TR 7:7). During the time that Ms. Jenkins has served as the district's special services director, the district has not employed a teacher who was certified in deaf education and the only individual employed by the district in that time frame who had experience with children with cochlear implants was a speech-language pathologist (TR 7:6-7). However, at the time of hearing, the district was serving three hearing impaired students and one deaf student and, in the past four years, has educated one student with a cochlear implant. Tr. 7:6.

112. The panel finds Ms. Jenkins testimony supportive of the proposition that some hearing impaired children with cochlear implants can be successfully educated in the public school setting but finds her testimony is irrelevant to the needs of Student and the Poplar Bluff School District's obligations to Student.

113. Dr. Chana Edwards testified as an expert witness for the District. Dr. Edwards has a bachelor's degree in communications, a master's degree in audiology communication sciences and disorders, and a doctorate of audiology degree (TR 7:238-39). She is certified by the American Speech Language Hearing Association, from which she holds the certificate of clinical competence and is a fellow with the American Academy of Audiology (TR 7:239). She also is a licensed hearing instrument specialist (TR 7:239). Dr. Edwards was not being paid to testify by the District or by the Multi-District Deaf and Hard of Hearing Program in which she is employed and she took a personal leave day to testify (TR 8:46, 90, 106).

114. At the time of hearing, Dr. Edwards had been employed for 6 years as an educational audiologist with the Multi-District Deaf and Hard of Hearing Program (the "Program") that is housed within the Blue Springs, Missouri School District (TR 7:235, 239). The Program is within the greater Kansas City area and contracts with 30 school districts<sup>17</sup> within that area (Poplar Bluff is not included within this geographic area) (TR 7:235, 241; TR 8:106). The Program also operates a deaf education program that is housed in the Blue Springs School District in which about 30 students, some with cochlear implants, participate (TR 7:245-46). The deaf education program is a total communication program in which the certified teachers of the deaf use sign language coupled with speech (TR 7:245). She provides services to that program that are similar in nature to those provided to the member districts (TR 7:246). As an educational audiologist, Dr. Edwards provides hearing testing, including full comprehensive audiological and amplification evaluations, and troubleshoots hearing aids (TR 7:236). She also teaches school personnel how to work with hearing aids and to do some basic troubleshooting (*Id.*). She also works with dispensing audiologist and cochlear implant centers (TR 7:236-37). Dr. Edwards also is a member of IEP teams, in-services school districts on topics such as how to acoustically modify their classrooms, and makes recommendations with respect to accommodations, modifications and supports for staff working with hearing impaired children

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<sup>17</sup> Some of those districts are as small as a few hundred students and some as large as several thousand students. (TR 7:241).

(TR 2:237). Dr. Edwards has experience working with hearing impaired children in educational environments and estimated that, in the six years that she has been with the Program, she has worked with approximately 400 such children throughout the 30 school districts that participate in the Program, of whom approximately 50 had cochlear implants (TR 7:243, 250). The vast majority of the children have been placed in their home schools and, of the 30 districts, only about 5 had certified teachers of the deaf on staff (TR 7:266). Dr. Edwards is not a certified deaf education teacher, or a speech language pathologist and has never taught children (TR 8:28-9). She is not qualified to map a cochlear implant (TR 8:42-3).

115. Dr. Edwards testified that she defines a deaf person as one who has an unaided profound hearing loss in both ears (TR 7:258). If the child's audiogram, aided or unaided, places the child outside that range, then Dr. Edwards defines that child as hearing impaired (TR 7:258-59). Thus, if the child communicates through amplification such as a cochlear implant, uses his audition and does not communicate with sign language, she views that child as hearing impaired (TR 7:259). Based on her review of Student's audiograms, she would lean toward categorizing Student as hearing impaired and an auditory oral communicator (TR 7:259-60). Based on her review of Student's records and the evidence, Dr. Edwards characterized Student as perilingually to postlingually deafened (TR 7:260). Dr. Edwards testified that when a child is exposed to language prior to having a hearing impairment, the child already has the foundation for speech and for language and generally, one can expect those students to progress faster and some different strategies can be used in working with these children compared to the strategies used with children who had hearing impairments since birth or who were never exposed to spoken language (TR 7:162). In Dr. Edwards' opinion, it is never appropriate to use the same methods or strategies for all hearing impaired or deaf children (*Id.*).

116. Dr. Edwards also testified with respect to the acquisition of language in deaf and hearing impaired students (TR 7:292). A true deaf person acquires language through visual modalities, including lip reading and manual signs (TR 7:291-92). If that deaf child is in an environment where sign language is the primary mode of communication, the child learns language incidentally as all persons do (TR 7:292). If the child is in an environment where the parents are auditory oral, then they would need instruction in a sign language manual form of communication (TR 7:292). If the child is not deaf, the manner in which the child acquires language will depend on the severity of the hearing loss with the vast majority of hearing impaired students whose parents are auditory oral learning some language incidentally although there will need to be some rehabilitation of the language if they learn it incorrectly (TR 7:292). That can be provided by speech-language pathologists or certified teachers of the deaf (TR 7:292). Based on her review of records, Dr. Edwards testified that, up to the point of her hearing loss, Student acquired her expressive and receptive language from the auditory oral modality, both incidentally and/or through direct instruction (TR 7:293).

117. Dr. Edwards testified that in her opinion, a student with a cochlear implant would not necessarily qualify to receive special education services pursuant to the IDEA and she assists school districts in the process of determining an individual student's eligibility under IDEA (TR 7:243). Factors that are considered in such eligibility decisions include the type of hearing loss, the severity of the loss, when the child was amplified and aided, whether the student's hearing loss occurred prelingually or postlingually and the communication mode (TR 7:245-46). In Dr.

Edwards' opinion, a student who has a cochlear implant does not need to have language skills commensurate with their same age peers to receive benefit in a regular classroom or in a public school setting because there are children with varying language abilities and the public schools can provide appropriate services to boost language (TR 8:7-8). In addition, she thought an IEP for Student in order to provide FAPE should have teaching spoken language as a component of the IEP but should not be the "underlying premise" of the IEP (TR 8:10). She read Dr. Nevins book and used it and recommended it to public school districts and believed the book supported "whatever environment works for children" be it auditory oral or otherwise (TR 8:9).

118. During her six years with the Program, Dr. Edwards has served as a member of teams where the team decision was to propose the use of an outside private program, including auditory oral programs (TR 7:247-48). Dr. Edwards has observed the auditory oral program at the Moog Center in St. Louis (TR 7:249). When looking at whether a student should be placed in such a program, Dr. Edwards looks at the age of onset of the hearing loss, the child's linguistic level, articulation and expressive and receptive language skills, home support systems, any outside therapist's recommendations and progress notes (TR 7:249). She generally recommends that type of program for a student whose language scores are "very good" – within average limits – as well as evidence of speech and language therapy success (TR 7:250). She also looks to see if there is evidence of success using amplification, either through hearing aids or a cochlear implant (TR 7:250). In Dr. Edwards' opinion, the students who perform best in a Moog-type environment are those who were deafened postlingually and have had a good basis for speech and language (TR 7:250). She would recommend placement for such students just for rehabilitation post-implant for the small amount of remediation that needs to occur when a child has suffered from a sudden hearing loss and would not necessarily recommend an all-day placement in that situation (TR 7:251).

119. As part of her consultation, Dr. Edwards makes recommendations on how public schools can acoustically adjust the environment for hearing impaired students (TR 7:267). At hearing, Dr. Edwards testified with respect to Student's audiogram dated August 25, 2005 (TR 7:271-75; P-113). The audiogram showed that, in her right ear, Student is aided to within the normal hearing range and should be able to detect if somebody was whispering to her using just her right hearing aid (TR 7:274-75). In the left ear (the one with the implant), she was mapped in the 25-30 range, which is in the normal range (*Id.*).<sup>18</sup> Based just on that audiogram, Dr. Edwards testified that she thought that Student could be successful in the regular education classroom with some modifications and accommodations, but she would have liked to have seen more testing to see primarily if an FM system would be of assistance (TR 7:279). With the cochlear implant and the hearing aid, the audiograms show that Student had access to normal conversational level speech and could, at that point, have the opportunity to learn language incidentally as well as through direct instruction (TR 8:84). Based on her review of records, Student's receptive language skills and her audiograms, and "looking at least restrictive environment", Dr. Edwards testified that her recommendation for Student's placement was at the

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<sup>18</sup> Dr. Edwards did express some concern about the mapping of Student's cochlear implant based on the August 2005 audiogram and thought that it could have been mapped in such a way to reduce background noise (TR 7:276). She would have liked to have seen binaural hearing testing that assessed Student's hearing with both the hearing aid and cochlear implant in place as in her opinion that would provide information on localization and self-advocacy skills and may result in better word recognition (TR 7: 289-291).

home school with accommodations, modifications and supports with some time in a special education environment and with part of her day in a regular education classroom (TR 7:280).

120. Ms. Edwards observed some early childhood education rooms, some kindergarten rooms, the lunchrooms, the playground and the gymnasium at the district for acoustical issues (TR 7:298-99) and also observed Angela Turner and two speech-language pathologists (TR 7:257-58). Dr. Edwards testified that in her opinion, observed that a hearing impaired student with whom Ms. Turner was working was able to correctly identify what Ms. Turner was saying, even with a barrier in front of Ms. Turner's mouth (TR 7:263). She appeared to be able to identify high frequency sounds used by students and articulate them back (TR 7:264). Dr. Edwards testified that she might have a minor concern in speech, but none in academics, language or audition but the concerns were outweighed by the benefits of Student working with Ms. Turner (TR 7:264). With respect to speech, Dr. Edwards noted that, while at Moog, Student is exposed to peers with imperfect speech (TR 7:264-65). She also testified that in her opinion a speech language pathologist who holds the certificate of clinical competence could provide appropriate speech, language and audition therapy to Student (TR 7:265; 8:99-101).

121. Dr. Edwards also observed Debbie Harper's teaching for about 1 to 1 ½ hours and testified that based on observation, she might have recommended an FM system for Student in that classroom during whole group instruction (TR 7:299-300). She also observed Ms. Harper using many strategies that that Dr. Edwards thought were appropriate for a child with a hearing impairment (TR 7:301). Based on her review of the records and her observation in Ms. Harper's classroom, she testified that Ms. Harper's regular education classroom would have been an appropriate placement for Student during the 2004-05 school year (TR 7:301).

122. Based on her review of records, Dr. Edwards testified that Student had normal hearing prior to July 2004, but at some periods she had a mild to moderate conductive hearing loss, which can be caused by an ear infection or middle ear disease and is medically treatable (TR 7:294). After Student's hearing went back to the normal range, that fluctuating conductive loss could have impacted Student's language skills, generally more in the expressive area than receptive (TR 7:294-96). Such losses also can impact a child's speech intelligibility (TR 7:296). In July 2004, Student suffered a sensorineural hearing loss and received a hearing aid in her right ear, which would have positively impacted her speech and language (TR 7:297-98). Dr. Edwards testified that the hearing aid alone without additional supports and/or therapies would have improved her language skills and her speech intelligibility as long as she had consistent access to sound and the hearing aid was functioning properly (TR 7:298).

123. In Dr. Edwards' opinion, Student's IEPs, to be appropriate, need to address academics, speech and articulation therapy, language therapy and auditory training (TR 8:11). In her opinion, the Poplar Bluff IEPs proposed an appropriate education for Student in the least restrictive environment (TR 7:303-04; 8:11, 18-19, 72). She also testified she had knowledge of situations where a facilitator or one-on-one aide was utilized for hearing impaired students in the regular classroom and other environments and she has recommended that herself as an accommodation (TR 8:17). She testified that the use of a one-on-one facilitator in her opinion was appropriate for Student, and if appropriately trained, the facilitator would not interfere with the child's ability to get instruction from the classroom teacher (TR 8:18). She did not believe

the Moog IEP was individualized to Student's needs and did not address appropriate academic information and accommodations and modifications to the actual classroom (TR 8:16).

## **DISCUSSION AND DECISION RATIONALE**

### **General Legal Principles of FAPE, LRE and Private School Placement:**

Under the IDEA, all children with disabilities as defined by the statute are entitled to a free appropriate public education in the least restrictive environment appropriate to allow that child to receive educational benefit. 20 U.S.C. §§ 1412(a)(1)(5); 1401(8). In addition to the federal statute and its implementing regulations at 34 CFR Part 300, Missouri has adopted a plan ("State Plan") setting forth requirements imposed upon school districts for the provision of FAPE.

Under the Supreme Court test established by *Board of Education v. Rowley*, 458 U.S. 176, 203 (1982), FAPE consists of educational instruction specifically designed to meet the unique needs of the handicapped child, and related services as are necessary to permit the child to benefit from the instruction. FAPE is not required to maximize the potential of each child; however, it must be sufficient to confer educational benefit. *Id.* at 200. The *Rowley* standard is satisfied by providing meaningful access to educational opportunities for the disabled child. *Id.* at 192. The *Rowley* court determined that the IDEA requires school districts to provide a "basic floor of opportunity" consisting of "access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." *Id.* at 201. The Supreme Court found Congress' intent in passing the IDEA was "more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside." *Id.* at 192.

The extent of educational benefit to be provided to the handicapped child is not defined by *Rowley*; the Supreme Court required an analysis of the unique needs of the handicapped child to carry out the congressional purpose of access to a free appropriate public education. *Id.* at 188. However the Supreme Court found implicit in this purpose, the "requirement that the education to which access is provided be sufficient to confer *some* educational benefit upon the handicapped child." *Id.* at 200 (emphasis added). Federal courts interpreting *Rowley* have held that *Rowley* does not require a school district "to either maximize a student's potential or provide the best possible education at public expense." *Fort Zumwalt School District v. Clynes*, 119 F.3d 607, 612 (8<sup>th</sup> Cir. 1997), *cert. denied*, 523 U.S. 1137 (1998). A school district is not required to provide a program that will "achieve outstanding results" (*E.S. v. Independent School District No. 196*, 135 F.3d 566, 569 (8<sup>th</sup> Cir. 1998) or one that is "absolutely best" (*Tucker v. Calloway County Board of Education*, 136 F.3d 495, 505 (6<sup>th</sup> Cir. 1998) or one that will provide "superior results" (*Ft. Zumwalt*, 119 F.3d at 613). However, the *Rowley* requirement of consideration of the unique needs of the handicapped child does require consideration of the child's capacity to learn. *Nein v. Greater Clark County School Corporation*, 95 F.Supp.2d 961, 973 (S.D. Ind. 2000). The requirement of "some educational benefit" requires more than a "trivial" benefit but not a maximization of the potential of a handicapped child. *N.J. v. Northwest R-1 School District*, 2005 U.S. Dist. LEXIS 24673, 22 (E.D. Mo. 2005).

To achieve its goals, the IDEA “establishes a comprehensive system of procedural safeguards designed to ensure parental participation in decisions concerning the education of their disabled children and to provide administrative and judicial review of any decisions with which those parents disagree.” *Honig v. Doe*, 484 U.S. 305, 308 (1988). The primary vehicle for carrying out the IDEA’s goals in the provision of FAPE is the Individualized Education Program (“IEP”). 20 U.S.C. §§ 1414(d), 1401(8). An IEP must be in effect at the beginning of the school year for each child with a disability who has been deemed eligible for services. State Plan; 34 CFR § 300.342. An IEP is a written document containing, among other things:

- (a) a statement of the child’s present levels of educational performance; including how the child’s disability affects the child’s involvement in the general curriculum;
- (b) a statement of measurable annual goals, including benchmarks or short-term objectives related to meeting the child’s needs that result from the child’s disability to enable the child to be involved in and progress in the general curriculum; and
- (c) a statement of the special education, related services, supplementary aids and services, and modifications and accommodations to be provided to the child to enable the child to advance appropriately toward attaining those annual goals, to be involved and progress in the general curriculum, to be educated and to participate with other children in these activities, both disabled and nondisabled.

20 U.S.C. § 1414(d)(1)(B); 34 C.F.R. § 300.347; Regulation IV of Missouri State Plan.

For children who are deaf or hard of hearing, the statute and regulations and State Plan require the consideration of the communication needs of the child, including the child’s language and communication mode, “including opportunities for direct instruction in the child’s language and communication mode.” 20 U.S.C. § 1414(d)(3)(B); State Plan; 34 C.F.R. § 300.346(a)(2)(iv).

Under *Rowley*, there are two components to the FAPE analysis, one procedural and the other substantive. An educational program can be set aside for failure to provide FAPE on procedural grounds under three circumstances: (1) where the procedural inadequacies have “compromised the pupil’s right to an appropriate education”; (2) when the district’s conduct has “seriously hampered the parents’ opportunity to participate in the formulation process”; or (3) when the procedural failure has resulted in “a deprivation of educational benefits.” *Independent School District No. 283 v. S.D.*, 88 F.3d at 556. Where this type of harm is found, the substantive question of whether the IEP provided FAPE is not addressed by the hearing panel. *W.B. v. Target Range School District*, 960 F.2d 1479, 1485 (9<sup>th</sup> Cir. 1991). Assuming no denial of FAPE on procedural grounds, the analysis turns to the substance of whether the IEP provides FAPE as defined by the *Rowley* standard.

Under the *Rowley* standard, the ultimate question for a court under the IDEA is “whether a proposed IEP is adequate and appropriate for a particular child at a given point in time.” *Rowley*, 458 U.S. at 200; *Town of Burlington v. Dept. of Education*, 736 F.2d 773, 788 (1<sup>st</sup> Cir. 1984), *aff’d* 471 U.S. 359 (1985). An IEP is not required to maximize the educational benefit to a child or to provide each and every service and accommodation that could conceivably be of some



educational benefit. *Rowley*, 458 U.S. at 200; *Gill v. Columbia 93 School District*, 217 F.3d 1027, 1035-36 (8<sup>th</sup> Cir. 2000). Although parental preferences must be taken into consideration in deciding IEP goals and objectives and making placement decisions, the IDEA “does not require a school district to provide a child with the specific educational placement that her parents prefer.” *Blackmon v. Springfield R-XII School District*, 198 F.3d 648, 658 (8<sup>th</sup> Cir. 1999); *T.F. v. Special School District*, 449 F.3d 816, 821 (8<sup>th</sup> Cir. 2006). The issue is whether the school district’s placement is appropriate, “not whether another placement would also be appropriate, or even better for that matter.” *Heather S. v. Wisconsin*, 125 F.3d 1045, 1057 (7<sup>th</sup> Cir. 1997).

In addition to the FAPE requirement, there is a “strong congressional preference” under the IDEA for educating students in the least restrictive environment. *Rowley*, 458 U.S. at 202; *Carl D. v. Special School District of St. Louis County*, 21 F.Supp.2d 1042, 1058 (E.D. Mo. 1998). The IDEA regulations embody the LRE concept:

Each public agency shall ensure-

- (1) That to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are non-disabled; and
- (2) That special classes, separate schooling or other removal of children with disabilities from the general educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

34 CFR § 300.550.

The *Rowley* court acknowledged that regular classroom environments are not suitable for the education of many handicapped children. “Mainstreaming” in the regular classroom environment is required “to the greatest extent appropriate,” considering the needs of the child. *Beth B. v. Van Clay*, 282 F.3d 493, 498 (7<sup>th</sup> Cir.), *cert. denied*, 537 U.S. 948 (2002) (quoting 20 U.S.C. § 1412(5)). The statutory language reflecting a mainstreaming preference has also been determined to reflect a ‘presumption in favor of the [student’s] placement in the public schools. *Blackmon*, 198 F.3d at 661; *Independent School District No. 283 v. S.D.*, 88 F.3d 556, 561 (8<sup>th</sup> Cir. 1996); *Mark A. v. Grant Wood Area Education Agency*, 795 F.2d 52, 54 (8<sup>th</sup> Cir. 1986), *cert. denied*, 480 U.S. 936 (1987).

Each school district must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services, including instruction in the regular classes (general education environments) with any necessary supplementary services such as resource room or itinerant instruction, special classes, special schools, home instruction, and instruction in hospitals and institutions. 34 CFR § 300.551. The least restrictive environment should always be considered in determining whether a parentally preferred placement is appropriate. *Independent School District No. 83 v. S.D.*, 88 F.3d at 556, 561 (8<sup>th</sup> Cir. 1996).

Parents are not required to keep their children in educational placements proposed by school districts that the parents believe are inappropriate. However, “parents who unilaterally change

their child's placement during the pendency of the review proceedings, without the consent of state or local school officials, do so at their own financial risk." *Burlington v. Department of Education*, 471 U.S. 359, 373-74 (1985); *Fort Zumwalt*, 119 F.3d, 611-12; *T.F. v. Special School District*, 449 at 820. Reimbursement is only appropriate if the public school district has failed to provide FAPE and the parental placement is appropriate. *Burlington*, 417 U.S. at 370. If this showing is not made, the costs of the private placement do not shift to the public agency and the parents bear the cost of the private placement. *Id.*; *Florence County School District No. 4 v. Carter*, 510 U.S. 7 (1993).

The 1997 amendments to the IDEA specifically address unilateral private placements by parents as follows:

(a) *General.* This part does not require an LEA [local education agency] to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made FAPE available to the child and the parents elected to place the child in a private school or facility....

(b) *Disagreements about FAPE.* Disagreements between a parent and a public agency regarding the availability of a program appropriate for the child, and the question of financial responsibility, are subject to the due process procedures of §§ 300.500-300.517.

(c) *Reimbursement for private school placements.* If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private preschool, elementary, or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made FAPE available to the child in a timely manner prior to that enrollment and that private placement is appropriate. A parental placement may be found to be appropriate by a hearing officer or a court even if it does not meet the State standards that apply to education provided by the SEA [state education agency] and LEAs.

(d) *Limitations on reimbursement.* The cost of reimbursement described in paragraph (c) of this section may be reduced or denied –

(1) If-

(i) At the most recent IEP meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP team that they were rejecting the placement proposed by the public agency to provide FAPE to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or

(ii) At least ten (10) business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in paragraph (d)(1)(i) of this section;

(2) If, prior to the parents' removal of the child from the public school, the public agency informed the parents, through the notice requirements described

in § 300.503(a)(1), of its intent to evaluate the child (including a statement of the purpose of the evaluation that was appropriate and reasonable) but the parents did not make the child available for the evaluation;

(3) Upon a judicial finding of unreasonableness with respect to actions taken by the parents.

(e) *Exception.* Notwithstanding the notice requirements in paragraph (d)(1) of this section, the cost of reimbursement may not be reduced or denied for failure to provide the notice if-

(1) The parent is illiterate and cannot write in English;

(2) Compliance with paragraph (d)(1) would likely result in physical or serious emotional harm to the child;

(3) The school prevented the parent from providing the notice; or,

(4) The parents had not received notice, pursuant to section 615 of the Act, or the notice requirement in paragraph (d)(1) of this section.

300 C.F.R. § 300.403.

The analysis is not, as the School District suggests, whether the parents gave the notice referenced by paragraph (d)(1) *before* the consideration of whether the District offered FAPE to Student. Rather, the analysis is first, did the District offer FAPE, and if not, was the private placement appropriate and if so, should reimbursement be reduced or denied if notice was not given.

The burden of proof in a due process hearing is on the party initiating the challenge to the IEP to prove a denial of FAPE. *Schaffer ex rel. Schaffer v. Weast*, \_\_\_ U.S. \_\_\_, 126 S.Ct. 528, 537 (2005). Accordingly, the burden of proof in this case is on the Petitioner to establish that the IEPs at issue did not provide FAPE to Student. Petitioner must sustain his burden of proof by a preponderance of the evidence, the standard appropriate to most civil proceedings and the standard utilized by reviewing courts of hearing panel decisions. *Blackmon*, 198 F.3d at 654; 20 U.S.C. § 1415(i)(2)(B); *Doe v. Defendant I*, 898 F.2d 1186, 1191 (6<sup>th</sup> Cir. 1990) (finding Student has the burden of proving by a preponderance of the evidence that the IEP was inadequate; citing *Tatro v. State of Texas*, 703 F.2d 823, 830 (5th Cir.), *aff'd in part and rev'd in part sub nom., Irving Indep. School Dist. v. Tatro*, 468 U.S. 883 (1984)).

## **PROCEDURAL ARGUMENT**

The Petitioner argues that the School District committed significant procedural violations on two grounds: one, that the District's actions precluded him from meaningfully participating in either the November 22, 2004 or March 2, 2005 IEP meetings by failing to propose a program that the parents could understand and refusing to answer reasonable questions about the experience and abilities of Student's proposed providers; and two, that after Student's hearing loss, that the School District failed to convene an IEP meeting to review and revise Student's IEP in violation of 20 U.S.C. § 1414(d)(4)(A) which requires a School District to revise the IEP as appropriate to address emerging or changing needs as they come to light.

With respect to the first issue, Petitioner argues that the proposed placement is unclear: under the November 22, 2004 IEP (“November 2004 IEP”), regarding the location of services; and under the March 2, 2005 IEP (“March 2005 IEP”), regarding both a lack of specificity with the number of special education minutes and the refusal of the District to identify the qualifications and certifications of the providers who would be working with Student.

The IDEA at 20 U.S.C. § 1415 sets forth the statutory procedural rights available to parents. *See also Evans v. District No. 17 of Douglas County, Neb.*, 841 F.2d 824, 828-31 (8<sup>th</sup> Cir. 1988).

## Sec. 1415. Procedural safeguards

### (a) Establishment of procedures

Any State educational agency, State agency, or local educational agency that receives assistance under this subchapter shall establish and maintain procedures in accordance with this section to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of a free appropriate public education by such agencies.

### (b) Types of procedures

The procedures required by this section shall include the following:

(1) An opportunity for the parents of a child with a disability to examine all records relating to such child and to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child.

....

(3) Written prior notice to the parents of the child, in accordance with subsection (c)(1), whenever the local educational agency -

(A) proposes to initiate or change; or

(B) refuses to initiate or change, the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to the child.

....

(6) An opportunity for any party to present a complaint -

(A) with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child;

....

### (c) Notification requirements

#### (1) Content of prior written notice

The notice required by subsection (b)(3) shall include -

(A) a description of the action proposed or refused by the agency;

(B) an explanation of why the agency proposes or refuses to take the action and a description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action;

(C) a statement that the parents of a child with a disability have protection under the procedural safeguards of this subchapter and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained;

(D) sources for parents to contact to obtain assistance in understanding the provisions of this subchapter;

(E) a description of other options considered by the IEP Team and the reason why those

options were rejected; and

(F) a description of the factors that are relevant to the agency's proposal or refusal.

#### **A. Right of Parental Participation**

The parent's right of participation is limited by the IDEA to the opportunity to participate in meetings, including IEP meetings, with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child. 20 U.S.C. § 1415 (b)(1); 34 C.F.R. §§ 300.345, 501; *see also Gill*, 217 F.3d at 1037. Parents also have the right to invite "other individuals who have knowledge or special expertise regarding the child," to attend IEP meetings and function as a member of the IEP team. 34 C.F.R. § 300.344(a)(6).

The IDEA's parental participation requirements are satisfied where "a school district provides parents with proper notice explaining the purpose of the IEP meetings, the meeting is conducted in a language that the parents can understand, . . . the parents are of normal intelligence, and they do not ask questions or otherwise express their confusion about the proceedings." *Blackmon*, 198 F.3d at 657; *see also Burilovich v. Bd. of Educ. of Lincoln*, 208 F.3d 560, 568 (6<sup>th</sup> Cir.) *cert. denied*, 531 U.S. 957 (2000) (finding that parents failed to demonstrate that they were denied participation in the special education process where they expressed their views and had the opportunity to participate at IEP meetings). A school district's "failure to apprehend and rectify that confusion" is not a procedural violation. *Blackmon*, 198 F.3d at 657.

The IDEA's encouragement of consensus in the development of the IEP does not mean that a school district must accede to parental demands. As the Eighth Circuit stated in *Blackmon*, "[a] school district's obligation under the IDEA to permit parental participation in the development of a child's educational plan should not be trivialized. . . . Nevertheless, the IDEA does not require school districts simply to accede to parents' demands without considering any suitable alternatives." 198 F.3d at 657. Thus, where a district considers, but rejects a parental request, "[t]he School District's adherence to this decision does not constitute a procedural violation of the IDEA simply because it did not grant [the] parents' request." *Id.* at 657.

The panel finds no violation of the IDEA in the area of parental participation. The Petitioner was notified of all IEP meetings and actively participated in all IEP meetings. There is no evidence that Petitioner or Moog representative were precluded from providing their input or opinions about the IEP components. There was no evidence that the District failed to answer any questions of Petitioner; rather, the District's answers may not have been the ones parent wanted to hear. The panel does not believe that the IEPs were unclear regarding the location of services or that the School District failed to discuss qualifications and certifications of proposed service providers. The specificity or lack thereof of special education minutes in the March 2005 IEP was discussed in response to Petitioner's questioning. The parents also were provided written notices of action when the District refused their request for placement at Moog. The Petitioner's feeling that the School District never seriously considered Moog does not equate to a procedural violation. The IEPs recite consideration of the private placement and the reasons for its rejection. The School District considered reports and evaluations from Moog in formulating IEPs for Student and making placement recommendations, as it is required to do. *N.J. v.*

*Northwest R-1 School District*, 2005 U.S. Dist. LEXIS 24673, 26 (E.D. Mo. 2005). Again, merely not acceding to parental demands is not a denial of FAPE. *Blackmon*, 198 F.3d at 657.

**B. Failure to Reevaluate or Refusal to Revise IEP**

The panel does not find any procedural violation with respect to the alleged failure of the District to reevaluate Student during the summer of 2004 after Petitioner informed Ms. Williams of Student's hearing loss. The first time the District may have been aware of Student's hearing loss was the last day of summer school when Student presented herself with a hearing aid, which was during the first week of August 2004. The existence of a hearing aid in and of itself does not suggest a hearing loss that would require a reevaluation or change in placement. School begins the end of August. The School District did call Petitioner's home in mid to late August 2004 to schedule a time to prepare the paperwork for reenrollment. The District was advised at that point that Student was not returning. Petitioner never requested that the School District propose a different program for Student; rather, Petitioner testified that he and his family never seriously considered a program at District for Student at this point in time. Petitioner testified that he assumed the District did not have an oral deaf program that could accommodate Student. It was not until after Student was enrolled at Moog that Petitioner thought to request reimbursement for the Moog program, which precipitated Petitioner's calls to the District and the subsequent reevaluation process.

The panel finds that Petitioner and his wife are intelligent people who made a deliberate decision not to investigate options through the School District in late summer 2004. If the parents were interested in the type of program available through the District for Student, they could have asked and knew the appropriate personnel to ask. Even if there was imposed on the District some obligation to develop a new IEP at this point, a delay of 2-3 weeks during the end of summer before the beginning of a new school year is not an unreasonable delay and did not prejudice Petitioner since it would have taken some amount of time anyway after the beginning of the school year to reevaluate Student and formulate a new IEP. Petitioner was requesting a change in Student's placement to Moog, which would constitute a significant change in placement necessitating a reevaluation. The School District personnel testified that Petitioner was advised of the School District's willingness to revise the IEP to provide services for Student in the District pending the reevaluation but Petitioner was not interested in any services available through the School District as this time.

Even beyond the specific allegations of Petitioner as to procedural insufficiency, the panel finds that the School District provided them with proper notice of their procedural rights under IDEA, gave them sufficient opportunities to review records, provided them with notice of all IEP meeting dates and purposes, invited the parents to meetings and reflected their attendance at and participation in meetings. There is no showing of any procedural defects in IEP development that would warrant a finding that the IEPs at issue were inadequate as this finding is only allowed if the deficiencies "compromised the pupil's right to an appropriate education, seriously hampered the parent's opportunity to participate in the formulation process, or caused a deprivation of educational benefits." *Blackmon, supra*, 198 F.3d at 656 (quoting *Independent School District No. 283 v. S.D.*, 88 F.3d at 562; *Roland M. v. Concord School Committee*, 910 F.2d 983, 994 (1<sup>st</sup> Cir. 1990), *cert. denied*, 499 U.S. 912 (1991)). The panel does not find the

existence of any procedural defects in the development of the IEPs that would present such circumstances.

### **SUBSTANTIVE ARGUMENT**

The panel considers whether FAPE was provided through the applicable IEPs for 3 time periods: at the beginning of the 2004 school year prior to the development of the November 22, 2004 IEP, from November 22, 2004, through March 2, 2005 and from March 2, 2005 onward.

The analysis of all IEPs as stated by the 8<sup>th</sup> Circuit, is whether the program offered an educational program “reasonably calculated to enable the child to receive educational benefits.” *Fort Zumwalt*, 119 F.3d at 611, quoting *Rowley*, 458 U.S. at 206-07. The question before the panel is whether the IEPs offered “personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.” *Rowley*, 458 U.S. at 203. The goal of FAPE is addressed “through the development of an IEP for each child setting forth her present level of performance, annual goals and objectives, specific services to be provided, an explanation of the extent to which she will not receive education with nondisabled children, a statement of modifications to district-wide assessment procedures needed in order for her to participate in such assessments, transition services needed, the projected dates and duration of proposed services, and objective criteria and evaluation procedures.” *Blackmon, supra*, 198 F.3d at 658; 20 U.S.C. Sec. 1414(d).

#### **A. Beginning of 2004 school year until November 22, 2004 IEP**

The panel finds that FAPE was provided through the IEPs developed in December 2003 and April 2004 (applicable for summer 2004), anticipating a return of Student to the preschool program in the fall. While Student suffered some hearing loss in July 2004, there was no showing by the parents that the program would have been inadequate had Student returned to the District in fall 2004, pending a reevaluation. The existence of a hearing aid itself may not indicate a change in circumstances sufficient to trigger a change in placement recommendation. The parents did not challenge the 2003-04 school year IEPs and their dispute with the School District during this period is that the School District should have reevaluated Student prior to the beginning of the 2004-05 school year, an issue addressed by the panel above. Moreover, the possibility that an adequate IEP was not in place at the beginning of the 2004-05 school year was caused by the parents’ failure to put the School District on notice as to Student’s hearing loss and the need for a revised IEP. *Ms. M. v. Portland School Committee*, 2003 U.S. Dist. LEXIS 8552, 55 (D. Me. 2003) (“Courts have refused... to hold a school district liable for the procedural violation of failing to have an IEP in effect at the commencement of the school year in circumstances in which a parent’s own actions frustrated the process of IEP completion”, citing *MM v. School District of Greenville County*, 303 F.3d 523 (4<sup>th</sup> Cir. 2002) and *Doe v. Defendant I*, 898 F.2d 1186).

Even if FAPE would not have been provided by this IEP and the other requirements for a reimbursement claim were met, namely that Moog was an appropriate placement (*see further discussion, infra*), the panel finds that the Petitioner’s failure to give advance notice of his intent to remove Student from public school precludes the reimbursement claim for the period prior to

the November 2004 IEP. The Petitioner's failure to discourse with the school District prior to the private placement and to allow the School District to develop an IEP prior to private placement precludes consideration of reimbursement for this period. *Schoenfeld v. Parkway School District*, 138 F.3d 379, 382 (8<sup>th</sup> Cir. 1998) ("Since Parkway was denied an opportunity to formulate a plan to meet [student's] needs, it cannot be shown that it had an inadequate plan under IDEA.") See also *L.K. v. Board of Education*, 113 F.Supp.2d 856, 861-62 (W.D. N.C. 2000) (failure to see an IEP before private school placement precludes reimbursement under IDEA). The parents' failure to provide notice prior to the private placement at the beginning of the school year arguably would have caused the continuation of an inappropriate IEP, that being one that did not address the hearing impairment. *Schoenbach v. District of Columbia*, 309 F.Supp.2d 71, 85-6 (D.D.C. 2004). Petitioner's request of a District paraprofessional about resources for deaf students does not constitute the prior notice contemplated by the statute and court decisions. As the *Schoenbach* court observed, "there is a difference between voicing general dissatisfaction and formally rejecting an IEP." *Id.* at 85, quoting *Loren F. v. Atlanta Independent School District*, 349 F.3d 1309, 1317 (11<sup>th</sup> Cir. 2003). Likewise, the mother's request for records does not constitute the formal rejection of an IEP required before seeking reimbursement. (See *Tigard-Tualatin School District 23J*, Oregon SEA 1999, 30 IDELR 745, finding that a phone call by a parent to a child's case manager, which was answered by the secretary, did not satisfy the notice requirement, nor did the request to have the child's record transferred to the private school).

During the period from the beginning of the school year through the November IEP, the District, once apprised of Petitioner's request for placement change, promptly worked to schedule IEP team meetings and a reevaluation. The Petitioner's failure to give the District notice prior to the beginning of the 2004 school year of his belief that FAPE would not be provided, deprived the District from the ability to develop an alternative IEP for this period of time. The District did offer to provide Student with enhanced educational services pending the reevaluation.

## **B. November 22, 2004 IEP**

Under IDEA, the services needed by each child with a disability to receive FAPE must be based on the child's unique needs and not on the child's disability. 34 C.F.R. § 300.300(a)(3)(ii). The determination of whether FAPE is provided by an IEP is determined from the time it is offered to the Student. *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031, 1039 (3<sup>rd</sup> Cir. 1993); *Burlington v. Department of Education*, 736 F.2d 773, 788 (1<sup>st</sup> Cir. 1984). The IEP must be made based upon information available to the school district at the time the IEP is prepared. *Gill v. Columbia 93 School District*, 31 IDELR 29, 18 (W.D. Mo. 1999) (refusing to consider post-IEP date evidence of student progress "[a]bsent some indication that the evidence was presented to the [school district] in an effort to get a revised IEP, the court finds that the relevant time in this case is that prior to March 21, 1997, when the IEP was developed and offered to [student]"), *aff'd*, 217 F.3d 1027 (8<sup>th</sup> Cir. 2000).

When reviewing IEPs, panels should keep in mind that state and local educational agencies are deemed to possess expertise in education policy and practice. *Burilovich v. Board of Education*, 200 F.3d 560 (6<sup>th</sup> Cir. 2000). Deference is to be given to the decisions made by professional educators. *Independent School District No. 283 v. S.D.*, 88 F.3d at 561 (noting that the hearing



officer was required to give “sufficient weight to the views of the School District’s professional educators”); *Gill v. Columbia 93 School District*, 217 F.3d 1027, 1038 (8<sup>th</sup> Cir. 2000) (courts “must defer to the judgment of education experts who craft and review a child’s IEP so long as the child receives some educational benefit and is educated alongside his non-disabled classmates to the maximum extent possible”). Once a procedurally proper IEP is developed, a reviewing court should be reluctant to second-guess the judgment of professional educators, and not disturb an IEP just because the court may disagree with its content, as long as the IEP provides the child with the “basic floor of opportunity that access to special education and related services provides.” *MM v. School District of Greenville County*, 303 F.3d 523, 532 (4<sup>th</sup> Cir. 2002), quoting from *Tice v. Botetourt County School Board*, 908 F.2d 1200, 1207 (4<sup>th</sup> cir. 1990).

Student suffered a precipitous hearing loss in October 2004 beyond her initial hearing loss in July 2004, during the time of reevaluation and development of this IEP. Although the parents desired a cochlear implant and scheduled one for implantation in January 2005, it would be premature of the November 2004 IEP to consider Student as a child with a cochlear implant for purposes of educational services before that time as the information presented to the School District was not for a child with a cochlear implant. *Fuhrmann*, 993 F.2d at 1040 (the “reasonable calculation” of educational benefit required by *Rowley* is determined at the time the IEP is offered, IDEA does not allow “Monday Morning Quarterbacking”).

The crux of Petitioner’s arguments against both IEPs is that he does not believe the District has the expertise or understanding to educate Student but that even if the District had the experience, the IEPs are not reasonably calculated to provide Student with meaningful educational benefit. The bulk of Petitioner’s expertise and understanding argument are with cochlear implants, which situation did not present until the February 2, 2005 IEP. With respect to the IEPs not providing meaningful educational benefit, the Petitioner disputes the placement decision of the November IEP regarding special education minutes. Petitioner argues that the removal of Student from the pre-kindergarten self-contained placement prior to hearing loss to a mainstream kindergarten setting for 65% of her day after hearing loss is not reasonably calculated to confer educational benefits. Petitioner contrasts the 1:2 or 1:1 teacher student ratio in the Moog kindergarten program with all teachers certified in deaf education and the existence of acoustical supports in the classroom, to what Student was to receive at the District under the November IEP placement. The Petitioner goes on to argue that the District did not understand the Moog program and used information provided by Moog that the District did not understand in formulating the goals in both IEPs. For instance, reading goals and audition goals were confused according to Petitioner. He also argues that the District expected Student to “soak up” language in the regular classroom environment which is not within the capabilities of a hearing impaired child with Student’s level of language.

The issue for the panel, however, is not whether the Moog placement is superior to the placement proposed by the District, which it may well be. *Heather S.*, 125 F.3d 1045, 1057 (7<sup>th</sup> Cir. 1997). The issue is whether the School District’s IEP provided FAPE for Student at that point in time based upon information available to the School District. The panel notes that the District was hampered in its ability to obtain information from observation because Student was not in

attendance at the District from the beginning of the school year prior to the development of the November IEP.

The panel first considers whether the November IEP includes a statement of Student's present levels of educational performance including how the child's disability affects the child's involvement and progress in the general curriculum. 20 U.S.C. § 1414(d)(1)(A)(I). There is no legal authority that sets forth exact specificity requirements in the statement of annual goals. *O'Toole v. Olathe District Schools*, 144 F.3d 692, 706 (10<sup>th</sup> Cir. 1998). A lack of specificity may be more of a minor technical violation than a denial of FAPE. *Doe v. Defendant I*, 898 F.2d at 1190 (the Supreme Court's emphasis on procedural safeguards in *Rowley* convinced *Doe* court that the Supreme Court was more concerned with "the process by which the IEP is produced, rather than the myriad of technical items that must be included in the written document").

There does not appear to be a dispute about the Student's present levels of educational performance (PLEP) as stated in the November IEP or goals and objectives for that matter. The issue is the placement where these goals and objectives can be accomplished in order to provide FAPE for Student. According to the Moog classroom teachers, even in November 2004 Student would not be able to follow classroom instruction and would not understand and comprehend what was going on in the classroom for a mainstream setting to provide a successful experience (TR 4:42, 123-24). The November 2004 IEP provided for 600 minutes per week of special education services in a self-contained classroom, with 30 minutes of special instruction daily in math and reading either one-on-one or small group, and 60 minutes of combined speech and language therapy. Student was mainstreamed in the regular classroom environment for 65% of the day, with the services of a full-time aide. She was also to receive an FM system to enhance the delivery of sound to her.

There is no real dispute about methodology – the School District was never unwilling to provide an oral deaf program. The dispute is whether the District had the expertise and the personnel to implement the program and whether the placement reflected the program. The District and Moog programs differ in emphasis, with Moog's emphasis more on listening and understanding of language as a prerequisite to other learning in the general curriculum, and with the District treating language and audition in a more compartmentalized manner and continuing to proceed with defined academic instruction. Methodology is a consideration under the IDEA regulations as in order to address the unique needs of the child that result from the child's disability, it may be necessary to adapt "the content, methodology, or delivery of instruction" in order to ensure access of the child to the general curriculum. 34 C.F.R. § 300.26(b)(3)<sup>19</sup>; see *Strawn v. Missouri State Board of Education*, 210 F.3d 954 (8<sup>th</sup> Cir. 2002) (considering communication needs of student with multiple disabilities).

At the time of the November 2004 IEP, Student had some hearing ability. She continued to present with the same speech and language delays addressed by prior IEPs. The panel majority finds that the November 2004 IEP was reasonably calculated to provide educational benefit to

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<sup>19</sup> U.S. Department of Education comment to this section stated that "there are circumstances in which the particular teaching methodology that will be used is an integral part of what is individualized about a student's education and, in those circumstances will need to be discussed at the IEP meeting and incorporated into the student's IEP." 64 Fed. Reg. 12552 (1999).

Student as a hearing impaired child. The required contents of the IEP were present. Her speech and language delays continued to be addressed as well as academic areas. Although the November 2004 placement recommendation was in kindergarten, based upon the Moog placement, the number of special education minutes from preschool to kindergarten increased even though the proportion of time in a segregated setting decreased because of the difference in class hours.<sup>20</sup> The IEP lists environmental accommodations described as appropriate for hearing impaired children. The IEP states goals and objectives that are developed in consideration of Student's present levels of educational performance. The Petitioner contends that some goals were for things that the Student could not yet perform, such as the hearing of high frequency sounds. However, Moog staff also testified that these sounds were not ignored, and if they occurred in the course of instruction, they would be worked on and modeled. The panel majority is not prepared to say that inclusion of one goal that might not be yet appropriate invalidates the entirety of the IEP.

While input from a teacher of the deaf may have resulted in a better IEP (and in fact Moog staff was requested to provide such input) and while more provision for staff training may have resulted in better delivery of the program, the panel does not find the IEP legally deficient. The 8<sup>th</sup> Circuit, in *Bradley v. Arkansas Dept. of Education*, 443 F.3d 965, 975 (8<sup>th</sup> Cir. 2006), responded to parents' contention that IEP failed because it was not developed with the assistance of persons knowledgeable of student's disability and contained inadequate provision for teacher and staff training, by stating that while the IEP "was not perfect", and while "[i]t may be that the District could have done more", 443 F.3d at 975, "the IDEA does not require a school either maximize a student's potential or provide the best possible education at public expense." *Id.*; quoting *Fort Zumwalt*, 119 F.3d at 612.

The Petitioner's objections to the credentials of the School District's staff are primarily that the teachers didn't understand, in Petitioner's opinion, how deaf children learn language and if they didn't understand this, they could not effectively teach Student. There was no evidence presented of any state requirement that hearing impaired children receive instruction only from state certified deaf education teachers. There is no dispute that the District's staff met State requirements for teacher qualifications. The staff that would be involved with Student did not need to have "every conceivable credential relevant to every child's disability." *Hartmann v. Loudoun County Board of Education*, 118 F.3d 996, 1001 (4<sup>th</sup> Cir. 1997), *cert. denied*, 522 U.S. 1046 (1998) ("We can think of few steps that would do more to usurp state educational standards and policy than to have federal courts re-write state teaching certification requirements in the guise of applying the IDEA.")<sup>21</sup>; *West Platte R-II School District v. Wilson*, Case No. 04-6040 at p. 11 (W.D. Mo. March 2, 2006) ("Unless and until the State requires teachers to be certified in dyslexia or obtain specialized training in dyslexia, this Court will not impose such a requirement of L.W.'s teachers"), *rev'd on other grounds*, 439 F.3d 782 (8<sup>th</sup> Cir. 2006). While the Supreme Court has acknowledged the importance of parental consultation in the IEP decision-making process, "nothing in the Court's opinions suggest that parents usurp the District's role in

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<sup>20</sup> The services summary page of the December 19, 2003 IEP, P-15 at 128 (R-11 appears to be missing this page), provides for 440 minutes per week of special education and the November 2004 IEP, R-29 at 331 provides for 600 minutes per week in *specialized classes* but then additional services through a facilitator in the regular classroom.

<sup>21</sup> The *Hartmann* court noted: "[n]ot all school systems will have the resources to hire top-notch consultants, nor will every school have the good fortune to have personnel who were involved in a major state program related to the needs of every disabled child." *Id.* at 1004.

selecting its staff to carry out the IEP's provisions.” *Slama v. Independent School District No. 2580*, 259 F.Supp. 880, 885 (D. Minn. 2003). The fact that Petitioner was not allowed to choose specific teachers to implement the IEP does not deny FAPE.

The Petitioner also complains that a one-on-one aide in the regular classroom environment is an inappropriate accommodation for his daughter's disability, that an aide would be ineffectual and distracting to Student and the other students. The Moog educators and experts did not believe that an aide would be effective; the School District educators and experts believed that an aide would be effective. To the extent that the use of an aide in the regular classroom environment as a way of achieving the goals and objectives of the IEP with LRE consideration, the issue is one of methodology. The panel is unable to say as a matter of law that the use of an aide would be an inappropriate educational methodology. *Fort Zumwalt*, 119 F.3d at 614 (“As long as a student is benefiting from his education, it is up to the educators to determine the appropriate educational methodology”, citing *Rowley*, 458 U.S. at 208). Of course, the proof would be in the implementation and if the implementation of the IEP with the use of the aide did not produce progress in meeting goals and objectives, then the efficacy of the aide could be properly questioned. The ultimate question is whether the student is benefiting from the education provided.

The panel majority finds that the November 2004 IEP was conceptualized to provide more than just a trivial educational benefit to Student. The measure of Student's intellectual potential at the time of IEP development, shows an IQ with a performance score in the average range. The November 2004 IEP is reasonably calculated to assist Student in the attainment of these goals commensurate with her intellectual potential, even though the achievement of this goal is not required by IDEA. *Rowley*, 458 U.S. at 703 (Congress acknowledged that access to education provided by IDEA “is not guaranteed to produce any particular outcome.”). As noted by the Eighth Circuit in *Bradley*, 443 F.3d at 974, an IEP is sufficient if it provides “some educational benefit” (quoting *Gill*, 217 F.3d at 1035) but the IDEA does not “guarantee that the student actually make any progress at all” (quoting *CJN v. Minneapolis Public Schools*, 323 F.3d 630, 642 (8<sup>th</sup> Cir.), cert. denied, 540 U.S. 984 (2003); see also *Houston Independent School District v. Caius R.*, 30 IDELR 578 (S.D. Tex. 1998)).

### **C. March 2, 2005 IEP**

This IEP was developed after the Student received her cochlear implant and after it was “turned on,” or initially mapped. Petitioner, while conceding that not only private oral schools can educate deaf children or that a deaf child with “less complex needs” could be educated at the District, argues that the lack of experienced staff can make a placement for a deaf child with a cochlear implant inappropriate. The standard of review for this IEP is the same as that discussed above with relation to the other IEPs. Petitioner's main complaint is that the School District did not have the expertise or an appropriate program in place for his daughter, either when she was hearing impaired or after the cochlear implant.

The IEP did contain the necessary elements. The PLEP in the February IEP does recite the cochlear implantation and additional information provided by Moog staff and parents. There is a specific audition goal addressing the cochlear implant. While the placement states the same

percentage of time in special education minutes, 600 minutes per week for a percentage of 35% of the school week in special education, as the prior IEP and still requires 30 minutes of special instruction daily in math and reading either one on one or small group and 60 minutes of combined speech, language and audition therapy, there is a provision for additional zero to 60 minutes of special education services for both math and reading, in the regular classroom environment, by use of “push-in” or “pull-out” services. The full-time aide also remains.

The needs and circumstances of Student changed dramatically from the time prior to the cochlear implant and after the implant was activated. In a cochlear implant SEA case, the hearing officer found in *Alief Independent School District*, 36 IDELR 252, 4 ECLPR 396 (SEA TX 2002), “the reality of [Student’s] changed circumstances to be highly relevant to the legal analysis of this case.” Student’s needs, as the student’s needs in *Alief*, shifted to “require a greater emphasis on developing audition and spoken language.” The *Alief* hearing officer found that the student’s IEP required a revision of speech therapy and auditory training to provide increased services and a systematic plan to teach student the skills of audition and speech. The testimony of the deaf education experts, Ms. Moog, Dr. Nevins, Ms. Gustus and others, point to a small window of opportunity for teaching a deaf child to speak. Student is still adjusting to the implant and must be taught how to distinguish sounds into speech.

The issue is thus whether the March 2005 IEP takes into account the change of circumstances and conceptualizes the FAPE that would be provided to Student if Student was in the public school program. While the IEP is again not perfect, the majority of the panel finds FAPE to be provided by this IEP. The March 2005 IEP contains an audition goal with 8 objectives, including: increasing the length of time with the CI (cochlear implant) processor to full-day; attending to speaker with appropriate eye contact, gestures, responses that indicate good listening for 20 minutes with no more than 1 prompt; detecting the “ling” sounds by providing correct production of each sound; identifying 3-syllable words differing in vowels and consonants; discriminating between words varying in number of syllables; identifying among words that differ in consonants; follow 3-part commands; and responding appropriately to commands and gestures or signs. The IEP provides for a self-contained environment for the speech/language/audition therapy and one on one or small groups in the self-contained environment for math and reading. The additional minutes provided for in the IEP were there to provide flexibility depending on the needs of Student, to provide additional services in a self-contained (“pull-out”) environment or in the regular classroom (“push-in”) environment. The goals and objectives were to be carried out both in the self-contained and regular classroom environment. There were provisions for mainstreaming, both in a non-academic and academic context. The IEP provides for access to the general curriculum and showed substantial differences from the November 2004 IEP, reflecting both changes in Student’s performance as evidenced from the records and information supplied by Moog and the presumed continuation of Student’s academic advancement. The panel majority believes the March 2005 IEP to be reasonably calculated to provide some benefit in assisting Student in the attainment of goals commensurate with her intellectual potential.

The IEP recites that an acoustical analysis (there is a cursory analysis on the alternate form I) will be provided upon Student’s return to the District, which is admittedly an important factor for cochlear implant students. The IEP is not perfect in this regard, and the panel would have liked

to have seen this analysis in place at the time of the IEP, as well as more information regarding training to be made available to teachers and staff and an explanation of how the audition goals would be met in the regular classroom environment. The IEP did reference that there would be coordination between the teacher of the deaf and all other teachers associated with Student on a daily basis. The panel must consider the requirement that the IEP be evaluated as written and must provide “a clear record of the educational placement and other services offered to the parents”; the capacity of the school district to provide services is not the issue. *Knable v. Bexley City School District*, 238 F.3d 755, 768 (6<sup>th</sup> Cir.), *cert. denied*, 533 U.S. 950 (2001). This consideration is weighed against the need for educators to be provided with flexibility in the regular classroom environment in determining specific day-to-day instructional approaches as long as the district’s approach allows the student to meet the ultimate goals and objectives of the IEP. 34 C.F.R. § 300.346; *Caius R.*, 30 IDELR 578. The IEP may not have been perfect but any technical deficiencies did not have the effect of denying FAPE. Moreover, in consideration of the fact that Petitioner made clear his intent that Student remain at Moog and not return to the District until she had completed the Moog program, the failure of the IEP to more specifically address these areas was not prejudicial.

The Petitioner has the same complaints regarding staff and the use of the aide as discussed under the November 2004 IEP and the panel majority makes the same conclusions as to those issues. As long as staff is certified, the parents cannot choose who the School District assigns to implement the IEP.<sup>22</sup> The issue of the aide is the methodology chosen by the School District to implement the IEP and the panel majority defers to the School District. The “primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child's needs, was left by the [IDEA] to state and local educational agencies in cooperation with the parents or guardian of the child.” *Evans*, 841 F.2d at 831, quoting *Rowley*, 458 U.S. at 207. According to the *Evans* court, “it is not our place to question whether different methods might work better.” *Id.*

With more specific regard to training, Petitioner contends that the lack of experienced staff would make the School District’s placement for Student post cochlear implant inappropriate and cites to a decision of the Florida State Educational Agency in *St. Johns County School Board*, 42 IDELR 75 (2004) in support. In the *St. Johns* case, the district proposed to place the child in a program that did not support the methodology of instruction, oral deaf, desired by the parents. The child was to be placed in a classroom with only developmentally impaired students without trained staff in the oral deaf methodology. This panel finds the *St. Johns* factual situation distinguishable. The *Foothill Special Education Local Plan Area* case (California SEA, 38

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<sup>22</sup> While the district did employ a certified deaf educator by the time of this IEP, she did not have extensive experience with cochlear implants. However, many of the Moog teachers when first employed at Moog likewise had limited experience with cochlear implants, a relatively new development in the field of deaf education. The School District’s deaf education teacher, Angela Turner, was profoundly hearing impaired herself and may not have been able to provide the modeling necessary for the Student to interpret the cochlear implant sounds into spoken language. Dr. Nevins, a recognized deaf education expert, noted the need for effective models for cochlear implant students. Even if an IEP provides FAPE, its improper or haphazard execution may result in a special education program that is not reasonably calculated to allow a child to receive educational benefits. *Berger v. Medina City School District*, 348 F.3d 513, 521 (6<sup>th</sup> Cir. 2003). However, this is an issue the parents may raise after implementation, not before.

IDELR 29, 2002) cited by Petitioner is also distinguishable. That case involved an infant and the services proposed by the district and only provided one hour sessions twice a week of individualized instruction for a cochlear implant child. The district educators intended to use other than oral approaches with the child. The *Foothill* educators also testified that they would not change their techniques to work with a cochlear implant infant. *Foothill* did acknowledge that while credentials alone do not necessarily qualify an individual to provide all possible services under that credential, conversely the lack of a credential does not necessarily render an individual unqualified to perform a service. The *Foothill* decision was also motivated by early childhood considerations. Regardless, it is certainly not required precedent for this panel and not reflective of 8<sup>th</sup> Circuit law regarding staff certification issues. *West Platte R-II School District v. Wilson*, Case No. 04-6040 (W.D. Mo. March 2, 2006). While the Poplar Bluff special educators were not extensively trained in cochlear implant technology, the educators did have experience working with oral deaf children. The IEP further provided for 4 audiological mapping visits annually<sup>23</sup> and daily cochlear implant checks with instruction on cochlear implant safety and impact of static electricity by the deaf education teacher.

The March 2005 IEP properly considered the issue of mainstreaming. The regular classroom environment is the preferable environment under the mainstreaming standard but again, this placement must consider the unique needs of the child. Further, “a placement that is not calculated to provide a meaningful educational benefit is unacceptable, and it is irrelevant whether such a placement would be the least restrictive choice.” *Montgomery Township Board of Education v. S.C.*, 135 Fed. Appx. 534, 538 (3<sup>rd</sup> Cir. 2005 – unpublished). Mainstreaming is not appropriate if the child would “derive virtually no academic benefit from the regular classroom.” *Hartmann v. Loudoun County Board of Education*, 118 F.3d 996, 1002 (4<sup>th</sup> Cir. 1997). The IDEA presumption in favor of mainstreaming is not required to be followed if “any marginal benefit from mainstreaming would be significantly outweighed by benefits which could feasibly be obtained only in a separate instructional setting.” *Id.* at 1001, quoting *DeVries v. Fairfax County School Board*, 882 F.2d 876, 879 (4<sup>th</sup> Cir. 1989).

The panel majority is unable to conclude that Student’s hearing impairment and other impairments would make it unlikely for her to receive any academic benefit from her time in a mainstream environment. The Moog and District witnesses testified that there would be some benefit achieved for both Student and other the non-disabled students from Student’s presence in the regular classroom environment. Not all expert witnesses agreed that FAPE could not be provided in the regular classroom environment. *T.F. v. Special School District*, 449 F.3d 816, 321 (8<sup>th</sup> Cir. 2006). The IEP, like the IEP reviewed by the district court in *Pachl v. Seagren*, 2005 U.S. Dist. LEXIS 9101, 20 (D. Minn. 2005), contained a mix of mainstream setting and special education, which would provide Student “with social interactions with her same aged non-disabled peers and will provide her increased opportunities to learn and practice functional life skills in more natural settings.” The IEP reserves the flexibility to increase the special education services available to Student to reach the goals and objectives of the IEP. Even if the time in a non-mainstream environment is increased, there is provision for integration with non-disabled students in a non-academic setting. Student’s placement in special education services

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<sup>23</sup> According to the School District, mapping is not required to be provided as part of the educational program at the expense of the District. Petitioner has not raised mapping at public expense as an issue for the panel.

could be increased without the necessity of placing Student in a private school setting. The preference under IDEA is for placement in the public schools. *Blackmon*, 88 F.3d at 561.

Under the applicable Eighth Circuit criteria that an IEP be designed to provide “some educational benefit,” and the preference for public education, the majority of the panel finds the IEPs as formulated to provide FAPE. Even Moog witnesses acknowledged some benefit could be obtained from implementation of the District’s IEPs. The crux of the issue for Petitioner is placement, not just placement in special education, but placement at Moog for special education. Placement does not refer to a specific program location, but to the program of special education services to be provided. *Concerned Parents for Continued Education v. New York City Board of Education*, 629 F.2d 751, 754 (2<sup>nd</sup> Cir. 1980) *cert. denied*, 449 U.S. 1078 (1981); *Weil v. Board of Elementary and Secondary Education*, 931 F.2d 1069 (5<sup>th</sup> Cir.) *cert. denied*, 112 S.Ct. 306 (1991). While one of Petitioner’s complaints was that Student was not capable of being successfully mainstreamed for any portion of the school day, there is nothing in the meeting notes for the IEPs or nothing in Petitioner’s testimony to indicate that he had requested additional time in special education for Student or that he wanted any change to the District’s placement recommendation. Petitioner wanted a program at Moog regardless of the special education placement provided by the School District. It was obvious to the panel that Petitioner was not willing to consider any District placement. Petitioner’s argument that only a Moog type environment will bridge the “gap” between Student and her nondisabled peers so that she may acquire speech and language commensurate with her nondisabled peers, misses the point that IDEA does not require gap-bridging or the provision of a commensurate education. The *Rowley* court stated:

Noticeably absent from the language of the statute is any substantive standard prescribing the level of education to be accorded handicapped children. Certainly the language of the statute contains no requirement like the one imposed by the lower courts--that States maximize the potential of handicapped children "commensurate with the opportunity provided to other children."

In *El Paso Independent School District v. Robert W.*, 898 F.Supp. 452 (W.D. Tex. 1995), the district court analyzed the same “gap-bridging” argument:

First and foremost, the administrative hearing officer was in error when he decided that [student] was not receiving meaningful educational benefit from his IEP because of the "widening gap" between [student] and his non-disabled peers. This is not the proper evaluation. The District Court in *Rowley* was applying this same standard to Amy Rowley's progress. The District Court found that Amy

'understands considerably less of what goes on in class that she could if she were not deaf' and thus 'is not learning as much, or performing as well academically, as she would without her handicap.' . . . This disparity between Amy's achievement and her potential led the court to decide that she was not receiving a 'free appropriate public education,' which the court defined as 'an opportunity to achieve [her] full potential commensurate with the opportunity provided to other children.' According to the District Court,



such a standard 'requires that the potential of the handicapped child be measured and compared to his or her performance, and that the resulting differential or "shortfall" be compared to the shortfall experienced by nonhandicapped children.'

898 F. Supp. at 449, quoting *Rowley*, 458 U.S. at 185-6. This of course was the standard that was rejected by the U.S. Supreme Court. See *Lancaster School District*, 44 IDELR 266 (SEA PA 2005) (denying parent's reimbursement request and noting that "gap-closing is not the substantive standard for FAPE").

## **RIGHT TO REIMBURSEMENT**

While the majority of the panel finds that the School District has provided FAPE to Student, the panel majority would likewise deny Petitioner reimbursement even if FAPE had not been provided. After a determination is made that FAPE is not provided by a school district, the next question is the appropriateness of the parents' placement. *Burlington, supra*, 471 U.S. 359, 370 (1985). The LRE requirement is also a consideration in the appropriateness of the private placement. *T.F. v. Special School District*, 449 F.3d at 821.

While it is correct that private schools do not need to meet state education standards in order to be deemed an appropriate placement according to the U.S. Supreme Court in *Florence County School District Four v. Carter*, 510 U.S. 7, 14 (1993), it is not true that a private school placement is to be reviewed absent all considerations under the IDEA. The district court, in *Reese v. Board of Education*, 225 F.Supp. 1149, 1159 (E.D. Mo. 2002), provides a summary of cases where courts have held that the private school placement chosen by the parents must comply with IDEA requirements. The private placement must "at a minimum, provide some element of special education services in which the public school placement was deficient." *Berger v. Medina City School District*, 348 F.3d 513, 523 (6<sup>th</sup> Cir 2003). While a "segregated environment does not disqualify schools that specialize in educating disabled children", *Justin G. v. Board of Education*, 148 F.Supp.2d 576, 584, (S.D. Md. 2001), and clearly parents generally opt for a private placement that is segregated in the area of their child's disability, mainstreaming must remain "a consideration that bears upon a parent's choice of an alternative placement and may be considered by the hearing officer in determining whether the [private] placement was appropriate." *Reese, supra*, 225 F.Supp2d at 1159-60, quoting from *M.S. v. Board of Education*, 231 F.3d 96, 105 (2<sup>nd</sup> Cir. 2000).

Mainstreaming in the regular classroom environment to the maximum extent possible is not required by IDEA; rather the law requires mainstreaming to the maximum extent appropriate. *Beth B. v. Van Clay*, 282 F.3d 493, 499 (7<sup>th</sup> Cir. 2002), *Board of Education v. Michael R.*, 2005 WL 2008919, 17-18 (N.D. Ill. 2005).

The panel majority is not prepared to say that the Moog placement would be appropriate in the event that FAPE had not been provided. While the Moog program is state approved and consequently must meet minimum state educational requirements, the panel observes that the School District educators testified that they could have provided comparable instructional strategies as employed by Moog. *Reese, supra*, 225 F.Supp. at 1162. The primary focus of

Moog is teaching deaf children to speak. While academic components are covered by the Moog program, the access of the disabled children in attendance to the general curriculum is not as extensive as that provided by the School District's proposed IEP. The self-contained instruction could have been increased without placement of Student in a private school geographically distant from her home. The Petitioner testified as to the adverse affect of Student's placement on the family dynamic, something rightly considered by hearing panels according to the *Reese* court. *Reese, supra*, 225 F.Supp.2d at 1162. While Student may have been progressing in the Moog program,<sup>24</sup> and while Moog provided an optimum acoustic environment and audition services, parental zeal in ensuring the best possible result for Student does not mean the School District is required to pay for the best possible result. *Slama, supra*, 259 F.Supp.2d at 882. While there was no guarantee that a public school setting would have ultimately accommodated student, the School District should have had the opportunity to try a less restrictive placement prior to a placement in a totally segregated environment. *Evans*, 841 F.2d at 832.

Assuming parents could have proved that Moog was an appropriate placement in the event FAPE had not been provided, the next step in the panel's analysis is to determine whether the reimbursement for the private placement should be reduced or denied because of the parents failure to provide the notice specified in 20 U.S.C. §1412(a)(10)(C) and 34 C.F.R. § 300.403 (d)(1)(i).

The panel has already discussed this issue in connection with the provision of FAPE prior to the November 2004 IEP and unanimously determined that parents would have been precluded. Whether parents would be precluded if FAPE had not been provided by the November 2004 and March 2005 IEPs requires additional analysis. While clearly no notice was provided prior to the unilateral placement before the development of the IEPs, if the IEPs were inadequate, should the parents continue to be denied reimbursement if their private placement was deemed appropriate?<sup>25</sup>

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<sup>24</sup> The improvement in Student's educational performance could be attributable solely to the amount of instruction received at Moog, which the School District is not required to replicate. *Blackmon, supra*, 198 F.3d at 660. Holding the School District to the Moog standard is not the standard for determining whether the District's IEP provided FAPE.

<sup>25</sup> A threshold question would be whether the School District was even under any obligation to develop IEPs for Students for the 2004-05 school year. The Eighth Circuit has held that "a school district is not required to develop and implement, on an annual basis, an IEP for a disabled student once he has been unilaterally placed in a private school by the parents." *Carl D. v. Special School District*, 21 F.2d 1042, 1057 (E.D. Mo. 1998). The 4<sup>th</sup> Circuit has held that a school district "is only required to continue developing IEPs for a disabled child no longer attending its schools when a prior year's IEP for the child is under administrative or judicial review." *MM v. School District of Greenville County*, 303 F.3d 523, 536 (2002). There was no prior year IEP for Student (that being for the 2003-04 school year) under review and thus, the School District may not have even been obligated to develop IEPs for the 2004-05 school year. The fact that it did so, evidences some good faith on the part of the School District to provide FAPE to Student. See 34 C.F.R. § 300.350(a)(2); *CJN v. Minneapolis Public Schools*, 323 F.3d 630, 642. Respondent further contends that since Student had been unilaterally placed by her parents in a school within the geographic boundaries of a different school district, that it is the new district that should be looked to for the provision of special education services, pursuant to 20 U.S.C. § 1412(a)(10)(A)(i) and proposed 34 C.F.R. § 300.132. However, the panel will not construe this to apply to placements made by parents in response to a perception that the local school district has not provided FAPE and in any event, this provision was not enacted at the time the due process complaint was filed.

The panel majority would exercise its discretionary authority to deny reimbursement to Petitioner even assuming the School District failed to provide FAPE by the 2004-05 IEPs and that the private placement was appropriate. While the parents did reject the November 2004 IEP by written notice sent to the District and by oral rejection at the February 2005 IEP meeting, the parents were not willing to allow the School District to continue efforts to remediate IEPs. *Greenland School District v. Amy N.*, 358 F.3d 150,160 (1<sup>st</sup> Cir. 2004). The IEPs at issue were “never given a chance to succeed.” *Doe v. Defendant I*, 898 F.2d at 1191. Petitioner then further refused to allow the sharing of information between Moog and the District subsequent to the March 2005 IEP meeting. The letter from Moog subsequent to the March 2005 IEP shows the futility of further efforts by the District. Consequently, it would have been impossible for the School District to continue to develop compliant IEPs for Student since the School District had to rely on information from Moog as the Student never returned to the District after her diagnosis of hearing impairment.<sup>26</sup>

Petitioner cites *M.M. v. School Board of Miami-Dade County*, 437 F.3d 1085 (11<sup>th</sup> Cir. 2006), in support of the proposition that even if a child has never enrolled in a public school, that reimbursement is proper if the district fails to offer a sufficient IEP, to counter Respondent’s contention that Student is a privately placed student not subject to the due process protections of the IDEA. The panel does not believe that 34 C.F.R. § 300.457 is meant to deny due process to unilateral placements in response to a parents’ belief that the local school district has not provided FAPE. See § 300.403(b), specifically allowing due process provisions to apply to disagreements about FAPE and financial responsibility for private placements. However, the child in *M.M.*, who incidentally had been implanted with a cochlear implant, was served by a public agency and received special education services prior to enrollment in the district. While it is true that the *M.M.* court did not require enrollment of a child pursuant to an inadequate IEP as a prerequisite to reserving the right to reimbursement, the *M.M.* court did not, as Petitioner states, find reimbursement legally appropriate for the involved child. *Id.* at 1099. The *M.M.* court denied reimbursement because it found the oral deaf instructional methodology proposed in the district’s IEP to provide FAPE regardless of whether the parents’ choice of methodology would provide more suitable instruction. *Id.* at 1103. The 11<sup>th</sup> Circuit confirmed that an IEP may not be challenged on the grounds that it does not contain the “best or most desirable program” for the child. *Id.* The court never reached the notice issue because it found that FAPE had been provided.

This panel does not find reimbursement to be precluded just by virtue of a private unilateral placement if FAPE is not provided by the IEP at issue and the private placement chosen by the parent is appropriate and if the notice requirements of 34 CFR § 300.449(d) are met. While a failure of notice allows the panel to deny or reduce reimbursement otherwise merited by the failure to provide FAPE, the bulk of applicable case law denies reimbursement when prior notice is not given.

The Petitioner argues that the lack of notice should not preclude parents indefinitely from receiving reimbursement, but argues that the failure to give the 10 day notice only prevents a claim of reimbursement for the period before the notice was given. In *A.Z. v. Mahwah Township*

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<sup>26</sup> This very well may determine whether the School District had a continuing obligation to develop IEPs beyond the 2004-05 school year.

*Board of Education*, 2006 WL 827791 (D.N.J. 2006) the district court allowed reimbursement for some school years after unilateral placement but not all. The district court allowed reimbursement based upon the district's failure to develop an IEP for student in time for the beginning of a school year, despite numerous attempts on the part of the parent to get the district to do so. *Id.* at 19-20. There was an IEP in place for Student at Poplar Bluff for the beginning of the 2004-05 school year that the panel determined to provide FAPE. Even if the IEP of March 2005 was deficient, the actions of the parents in not allowing the release of further information from Moog could have prevented the development of a compliant IEP for subsequent school years. The parents in *Mahwah Township* did provide written notice for the school year in which they sought reimbursement prior to beginning that year's enrollment but failed to do so for the prior school year in which reimbursement was denied. Petitioner herein did give written notice of the rejection of the November 2004 IEP but did not do so prior to the removal of the Student from the District.

Reimbursement may also be denied in the event of a finding that the parents acted unreasonably. The panel makes no such finding with respect to the parents' zealous pursuit of what they perceived to be the best educational setting for Student. However, the parents' subsequent refusal to provide access to records was unreasonable and prevented the subsequent development of IEPs, which the panel majority would consider as an additional reason to deny reimbursement certainly for the 2005-06 school year, although the panel has determined that this issue is not before it. Petitioner also cites *Petway v. District of Columbia*, 2005 U.S. Dist. LEXIS 36226, 38 (D.D.C. 2005) for the proposition that a total denial of reimbursement is too harsh when the parent's actions did not contribute to the inappropriateness of the child's educational plan. However, the parent in *Petway* did give advance notice after approving the IEP that she was removing the child during the course of the school year. The parent in *Petway* also testified that she made numerous attempts to persuade the school district to offer a more appropriate education. There was no showing that Petitioner requested any additional services from the Poplar Bluff School District other than placement at Moog. The panel finds this case distinguishable.

Even if reimbursement would not have been precluded by the panel in the event of a finding of denial of FAPE, there was no testimony as to the amount of the tuition actually paid by parents. *M.M. v. School Board*, 437 F.3d 1085 (11<sup>th</sup> Cir. 2006) (reimbursement for tuition limited "to the extent the parents actually paid any").

### **CONCLUSIONS OF LAW:**

The hearing panel makes the following conclusions of law on Petitioner's issues:

1. The Poplar Bluff School District did not deny FAPE to Student by procedural errors. All concur.
2. The School District did not act in bad faith when proposing educational placements to parents. All concur.
3. The IEPs for the 2004-05 school year did provide Student with FAPE. Panel member Smith concurs; panel member Rice dissents and files a separate decision, attached. Panel member Rice would find Moog an appropriate placement and would award

- reimbursement to parents from the date of the November 2004 IEP.
4. The IEP and placement for the 2005-06 school year are not properly before this panel and no ruling is made in that regard.

**DECISION:**

The foregoing duly considered, the Panel finds in favor of the Poplar Bluff R-1 School District on all issues raised by the Petitioner's due process request.

**APPEAL PROCEDURE**

This order constitutes the final decision of the Missouri Department of Elementary and Secondary Education in this matter. Pursuant to §162.962 R.S.Mo., the following procedures apply to requests for judicial review:

1. Proceedings for review may be instituted by filing a petition in the state circuit court of the county of proper venue within forty-five (45) days after the receipt of the notice of the agency's final decision and are governed by Chapter 536, R.S.Mo., to the extent not inconsistent with other provisions of Chapter 162 R.S.Mo. or 34 C.F.R. Part 300.

2. The venue of such cases shall be at the option of the plaintiff, be in the Circuit Court of Cole County, or in the county of the plaintiff's residence.

3. You also have a right to file a civil action in federal or state court pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. § 1415(i)(2) and 34 C.F.R. § 300.512.

IT IS SO ORDERED this 18<sup>th</sup> day of September, 2006.

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Janet Davis Baker  
Chairperson

Accord:

Dr. Patty Smith

Attachment: Dr. Gale Rice's dissenting statement

Copies sent this date to:

Petitioner (by regular and certified mail to Poplar Bluff residence)  
Respondent (by regular and certified mail)  
Neal Takiff, Jennifer Hanson and John Shock (by regular mail and e-mail)  
Teri Goldman (by regular mail and e-mail)  
Dr. Gale Rice (by regular mail and e-mail)  
Dr. Patty Smith (by regular mail and e-mail)  
Margaret Strecker, DESE (by regular mail and e-mail)  
Wanda Allen, DESE (by e-mail)

## Dissenting Opinion

### v. Poplar Bluff R-1 School District

#### **1. The IEP developed on 11-22-04 was not reasonably calculated to provide FAPE in the least restrictive educational environment.**

- At the time of this IEP, had been adventitiously deafened in one ear and had been diagnosed with a moderate-severe sensorineural hearing loss in the other. Prior to her hearing loss she had been diagnosed with speech-language delay and apraxia of speech. She received 60 minutes per day of speech-language services. The 11-22-04 IEP also allows 60 minutes per day for speech, language, and audition. This reflects LESS support for a child with substantially greater needs.
- 's language abilities would make it difficult for her to participate in a regular education classroom as a hearing child, much less as a child with significant hearing impairment. Expert testimony indicated that she required a more restrictive educational environment.
- There was no input from a teacher of the deaf to generate this IEP. While the IEP indicates on page 26, "Hearing Impaired Teacher will consult with all of 's", there was no teacher of the deaf employed by the District at the time, nor did personnel testify that they had consulted with a teacher of the deaf or with an individual who had expertise in this area.
- There are no true audition goals or objectives contained in this IEP. The speech-language goals and objectives remain basically unchanged from prior IEP's. It is assumed that she will progress from the point of the last IEP. There are few changes regarding her hearing loss.
- Physical modifications of educational space are indicated on the IEP, but not specified as required on the IEP form. The District did not have an environmental survey prior to developing the IEP.
- The District had limited experience with children who are deaf/hard-of-hearing. They did not seek a consultant with expertise in this area to help them develop and IEP.
- The District did evaluate in November, 2004 and had information from Moog Center for Deaf Education and did not add supports.
- A facilitator is included which frequently interferes with the classroom instructional process, especially for a child with hearing loss. 's language abilities were such that they required more support than restating directions.

#### **2. The IEP developed on 3-2-05 was not reasonably calculated to provide FAPE in the least restrictive educational environment.**

- Experts indicated that children who receive cochlear implants require intensive intervention for a minimum of one year and the IEP does not provide intensive intervention. This IEP was developed 1 month after initial mapping and prior to a second mapping.
- The teacher of the deaf is not an adequate model for articulation, voice, or prosody, nor is her hearing adequate to discriminate 's articulation errors. This is problematic as she pushes in to regular education classrooms.

- Goals and objectives/benchmarks were not consistent with skills reported on the PLEP and exceeded listening abilities. For example, was only hearing the sounds s,sh with 60% accuracy, which is not sufficient to make a production goal for these sounds. There were no other articulation goals, even though the PLEP indicates that she can produce only ½ sounds correctly.  
2/3 benchmark/objectives for reading are ones indicated that she could do in the PLEP. Reading goals and objectives/benchmarks were decontextualized and not consistent with appropriate reading instruction for a child with hearing loss and language impairment per experts. had also completed 1/5 writing objectives.
- A facilitator was included which frequently interferes with the classroom instructional process, especially for children who are deaf/hard-of-hearing. Expert testimony indicated that given 's language abilities, this accommodation would not benefit .
- Auditory training and speech-language therapy was provided only a maximum of one hour per day and was not integrated into the regular education setting in any specific way. This reflects LESS speech-language therapy time than the IEP on 12-03 (60 minutes per day) and in 11-04. The '03 IEP was prior to her adventitious deafness and the one in 11-04 prior to her cochlear implant. She is receiving less support for much greater needs.
- continued to have language delays which would make it difficult for her to participate in a regular education classroom as a hearing child, much less as a child who is deaf and implanted. Her language abilities were not adequate to participate in the regular curriculum in a regular education classroom.
- Physical modifications of educational space was indicated on the IEP, but not specified as is required on the IEP form. The District did not have an environmental survey prior to generating the IEP.
- The District did have the opportunity to evaluate in November, 2004 and despite her additional needs, did not add more treatment time.
- The District was not clear in the PLEP regarding the status of 's hearing. They indicate that she has been fitted with a BINAURAL hearing aid in her right ear.
- While the District claimed that the IEP could be reviewed and revised, there was no clear mechanism in place to do so. It attempted to claim both that they did not have the opportunity to evaluate her (they did) but that this was an appropriate IEP.
- The District had limited experience with both children who are deaf/hard-of-hearing and children and even less with children who have cochlear implants. Their additional training consisted largely of observation and short workshops. The teacher of the deaf had experience with one implanted child in a supervised practicum. The District did not recognize its need for a consultant at the least. The teacher of the deaf was also charged with training the facilitator and other school personnel and if she has experience at all, it is quite limited.

### **3. The Moog Center for Deaf Education did provide FAPE in the least restrictive educational environment for the 2004-05 school year.**

- Because Moog did provide FAPE in the least restrictive environment, the District should reimburse the family for 's education there. However, since the family unilaterally placed there, they should be reimbursed only from the date of the November, 2004 IEP.

Respectfully submitted,

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Gale B. Rice, Ph.D., CCC-SLP  
Hearing Officer